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Commercial Impracticability: A Textual and Economic Analysis of Section 2-615 of the Uniform Commercial Code‡

Norman R. Prance*

I. Introduction

Section 2-615(a) of the Uniform Commercial Code ("U.C.C."), titled "Excuse by Failure of Presupposed Conditions," provides that failure by parties to a contract to perform their obligations is not a breach when performance is rendered impracticable by a contingency the non-occurrence of which was a basic assumption on which the contract was made.[1] This section, the modern successor to common law doctrines of impossibility of performance and frustration of purpose, is the subject of a growing body of litigation[2] and an abundance of legal scholarship.[3]

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[1]Section 2-615(a) of the Uniform Commercial Code (1978 Official Text) provides:

> Except so far as a seller may have assumed a greater obligation and subject to the preceding section on substituted performance: (a) Delay in delivery or non-delivery in whole or in part by a seller who complies with paragraphs (b) and (c) is not a breach of his duty under a contract for sale if performance as agreed has been made impracticable by the occurrence of a contingency the non-occurrence of which was a basic assumption on which the contract was made or by compliance in good faith with any applicable foreign or domestic governmental regulation or order whether or not it later proves to be invalid.

[2]*See infra* notes 37-100 and accompanying text.

[3]*See* Berman, *Excuse For Nonperformance in the Light of Contract Practices in International Trade*, 63 Colum. L. Rev. 1413 (1963); Birmingham, *A Second Look at the Suez Canal Cases: Excuse For Nonperformance of Contractual Obligations in the Light of Economic Theory*, 20 Hastings L.J. 1393 (1969); Black, *Sales Contracts and Impracticability in a Changing World*, 13 St. Mary's L.J. 24 (1981); Cosway, *Sales—A Comparison of the Law in Washington and The Uniform Commercial Code*, 36 Wash. L. Rev. 50 (1961); Duesenberg, *Sales, Bulk Transfers, and Documents of Title*, 31 Bus. Law. 1533 (1976); Duesenberg, *"Impossibility": It Isn't Good Code Language*, 1 J. L. & Com. 29 (1981); Duesenberg, *Exiting from Bad Bargains Via U.C.C. Section 2-615:*

By and large, the litigation has resulted in opinions which interpret section 2-615(a) restrictively and limit severely the circumstances under which it serves as a basis for excuse. The scholarly articles are generally critical of this trend.

The existing literature and judicial opinions suffer from four deficiencies. First, they rarely advance an interpretation of section 2-615(a)

An Impractical Dream, 13 U.C.C. L.J. 32 (1980); Eagen, *The Westinghouse Uranium Contracts: Commercial Impracticability and Related Matters*, 18 Am. Bus. L.J. 281 (1980); Farnsworth, Brickell & Chawaga, *Relief for Mutual Mistake and Impracticability*, 1 J. L. & Com. 1 (1981); Harrison, *A Case for Loss Sharing*, 56 S. Cal. L. Rev. 573 (1983); Hawkland, *The Energy Crisis and Section 2-615 of the Uniform Commercial Code*, 79 Com. L.J. 75 (1974); Henszey, *U.C.C. Section 2-615 — Does "Impracticable" Mean Impossible*?, 10 U.C.C. L.J. 107 (1977); Huffmire, *Section 2-615 and Corporate Accountability*, 13 U.C.C. L.J. 256 (1981); Hurst, *Freedom of Contract In An Unstable Economy: Judicial Reallocation of Contractual Risks Under U.C.C. Section 2-615*, 54 N.C. L. Rev. 545 (1975); Jacobs, *Legal Realism or Legal Fiction? Impracticability Under the Restatement (Second) of Contracts*, 87 Com. L.J. 289 (1982); Jennings, *Commercial Impracticability — Does It Really Exist*?, 2 Whittier L. Rev. 241 (1980); Murray, *A Postscript: Ruminations and Presentations About Impracticability and Mistake*, 1 J. L. & Com. 59 (1981); Prance, *Energy Contract Planning: Allocating the Risks and Consequences of Commercial Impracticability*, 3 Hastings Int'l & Comp. L. Rev. 435 (1980); Rapsomanikis, *Frustration of Contract in International Trade Law and Comparative Saw*, 18 Duq. L. Rev. 551 (1980); Schlegel, *Of Nuts, and Ships, and Sealing Wax, Suez, and Frustrating Things — The Doctrine of Impossibility of Performance*, 23 Rutgers L. Rev. 419 (1969); Schmitt and Wollschlager, *Section 2-615 "Commercial Impracticability": Making the Impracticable Practicable*, 81 Com. L.J. 9 (1976); Schwartz, *Sales Law and Inflations*, 50 S. Cal. L. Rev. 1 (1976); Sirianni, *The Developing Law of Contractual Impracticability and Impossibility*, 14 U.C.C. L.J. 30 (1981); Sommer, *Commercial Impracticability — An Overview*, 13 Duq. L. Rev. 521 (1975); Speidel, *Court-Imposed Price Adjustments Under Long-Term Supply Contracts*, 76 Nw. U.L. Rev. 369 (1981); Speidel, *Excusable Nonperformance in Sales Contracts: Some Thoughts About Risk Management*, 32 S.C.L. Rev. 241 (1980); Spies, *Article 2: Breach, Repudiation and Excuse*, 30 Mo. L. Rev. 225 (1965); Squillante and Congalton, *Force Majeure*, 80 Com. L.J. 4 (1975); Tannenbaum, *Commercial Impracticability Under the Uniform Commercial Code: Natural Gas Distributors' Vehicle for Excusing Long-Term Requirements Contracts*?, 20 Hous. L. Rev. 771 (1983); Wallach, *The Excuse Defense in the Law of Contracts: Judicial Frustration of the U.C.C. Attempt to Liberalize the Law of Commercial Impracticability*, 55 Notre Dame Law. 203 (1979); White, *Contract Law in Modern Commercial Transactions, An Artifact of Twentieth Century Business Life*?, 22 Washburn L.J. 1 (1982); Note, *U.C.C. Section 2-615: Excusing the Impracticable*, 60 B.U.L. Rev. 575 (1980); Note, *The Economic Implications of the Doctrine of Impossibility*, 26 Hastings L.J. 1251 (1975); Note, *The Doctrine of Impossibility of Performance and the Foreseeability Text*, 6 Loy. U. Chi. L.J. 575 (1975); Note, *U.C.C. Section 2-615: Sharp Inflationary Increases in Cost As Excuse From Performance of Contract*, 50 Notre Dame Law. 297 (1974); Note, *The Role of Foreseeability In Allocation of Risk Under U.C.C. 2-615, Excuse by Failure of Presupposed Conditions*, 21 S. Tex. L.J. 441 (1980); Note, *Frustration As An Agricultural Buyer's Excuse Under U.C.C. Section 2-615*, 11 U.C.D. L. Rev. 351 (1978); Note, *Labor Strife and U.C.C. 2-615: One Strike and You're Out*?, 14 U.C.D. L. Rev. 669 (1981); Note, *U.C.C. Section 2-615: Defining Impracticability Due to Increased Expense*, 32 U. Fla. L. Rev. 516 (1980); Note, *Commercial Impracticability As a Contractual Defense*, 47 U.M.K.C. L. Rev. 650 (1979); Comment, *Commercial Impracticability and Intent in U.C.C. Section 2-615: A Reconciliation*, 9 Conn. L. Rev. 266 (1977); Comment, *Contractual*

solely or primarily on the strength of the language of the statute; many of the opinions and articles dwell instead on the language and concepts of the common law. Second, while many opinions and commentaries deal at length with the official comments to section 2-615(a), they pay scant attention to other evidence of Professor Llewellyn's[4] intent which militates in favor of a broad and expansive interpretation of section 2-615(a). Third, the judicial opinions only infrequently consider the operation of section 2-615(a) in light of the U.C.C.'s mandate for a liberalization of the commercial law. Finally, almost none of the existing material attempts to reconcile fundamental economic analysis with the language of the statute.

The purpose of this Article is to review the existing opinions and then to formulate an interpretation of section 2-615(a) that is true to the language of the statute, consistent with the U.C.C.'s general policies and the drafters' intent, and which is supported by basic microeconomic theory.

There are other tasks this Article does not attempt. First, it does not treat other sections of Article 2 which deal with commercial impracticability (sections 2-613, 2-614, 2-616, and in Mississippi only, 2-617). Second, the scope of this Article is confined to subsection (a) of section 2-615. Third, it does not deal with appropriate remedies following a finding that section 2-615(a) may properly be invoked; a number of creative pieces deal with this subject, including the suggestion in the

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Excuse Based On a Failure of Presupposed Conditions, 14 DUQ. L. REV. 235 (1975); Comment, *Sections 2-615 and 2-616 of the Uniform Commercial Code: Partial Solutions to the Problem of Excuse*, 5 HOFSTRA L. REV. 167 (1976); Comment, *Contractual Flexibility in a Volatile Economy: Saving U.C.C. Section 2-615 From The Common Law*, 72 NW. U.L. REV. 1032 (1978); Comment, *Relief from Burdensome Long-Term Contracts: Commercial Impracticability, Frustration of Purpose, Mutual Mistake of Fact, and Equitable Adjustment*, 47 Mo. L. REV. 79 (1982); Comment, *Crop Failure and Section 2-615 of the Uniform Commercial Code*, 22 S.D.L. REV. 529 (1977); Comment, *Uniform Commercial Code Section 2-615: Commercial Impracticability From the Buyer's Perspective*, 51 TEMP. L.Q. 518 (1978); Comment, *The International Uranium Cartel: International Economic Contingencies and Contractual Excuse Under Section 2-615 of the Uniform Commercial Code*, 14 TEX. INT'L L.J. 277 (1979).

[4]Professor Karl Llewellyn was the principal drafter of U.C.C. Article 2 on Sales. The U.C.C. was developed and drafted under the joint auspices of the American Law Institute and the National Conference of Commissioners on Uniform State Laws. Professor Llewellyn was also the "Chief Reporter" of the Editorial Board, the drafting body of this joint undertaking whose efforts produced this comprehensive piece of commercial legislation. Mr. William A. Schnader, another principal drafter of the Code and past President of the National Conference of Commissioners on Uniform State Laws, remarked regarding the choice for the Chief Reporter's position that

> [t]here was no difficulty in finding a "Chief Reporter." The outstanding man in the United States to undertake this task was Professor Karl N. Llewellyn of the Columbia University Law School. Not only was Professor Llewellyn a student of commercial law as it appeared in the law books, but he was the type of

official comments that the court may split the parties' losses.[5] Finally, this Article does not propose that states amend the language of section 2-615(a). Such a proposal is neither practical nor necessary; an appropriate interpretation of the language of section 2-615(a) is possible with no change to its text.

II. Common Law History

Scholars in this area routinely commence with a bow to the English and American case law preceding the Uniform Commercial Code. Because others have done so completely,[6] this Article's treatment of pre-Code developments is cursory.

The saga begins in 1647 with the English decision of *Paradine v. Jane*,[7] which enunciated the rule that contractual promises were absolute, and in no circumstances would a court excuse nonperformance. There is some question whether the law was as strict as that formulation suggests — even in 1647.[8] In any event, the famous 1863 opinion in

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> law professor who was never satisfied unless he knew exactly how commercial transactions were carried on in the market place. He insisted that the provisions of the Code should be drafted from the standpoint of what actually takes place from day to day in the commercial work rather than from the standpoint of what appeared in statutes and decisions.

Schader, *A Short History of the Preparation and Enactment of the Uniform Commercial Code*, 22 U. Miami L. Rev. 1, 4 (1967). *See also* Twining, Karl Llewellyn and the Realist Movement 270-340 (1973) for a more detailed examination of Professor Llewellyn's role in the history and drafting of this monumental piece of legislation. *See also* Corbin, *A Tribute To Karl Llewellyn*, 71 Yale L.J. 805 (1962), and Gilmore, *In Memoriam: Karl Llewellyn*, 71 Yale L.J. 813 (1962), for two personal reflections on Professor Llewellyn and his influence on the development and drafting of the Code, written respectively by Professors Corbin and Gilmore shortly after Professor Llewellyn's death.

[5] U.C.C. § 2-615 (1978) Official Comment 6 reads:

> In situations in which neither sense nor justice is served by either answer when the issue is posed in flat terms of "excuse" or "no excuse," adjustment under the various provisions of this Article is necessary, especially the sections on good faith, on insecurity and assurance and on the reading of all provisions in the light of their purposes, and the general policy of this Act to use equitable principles in furtherance of commercial standards and good faith.

See Speidel, *Court-Imposed Price Adjustments Under Long-Term Supply Contracts*, 76 Nw. U.L. Rev. 369 (1981). *See also* Harrison, *A Case for Loss Sharing*, 56 S. Cal. L. Rev. 573 (1982).

[6] *See, e.g.*, Schlegel, *Of Nuts, and Ships, And Sealing Wax, Suez, And Frustrating Things — The Doctrine of Impossibility Of Performance*, 23 Rutgers L. Rev. 419 (1966); *see also* Posner & Rosenfield, *Impossibility and Related Doctrines In Contract Law: An Economic Analysis*, 6 J. Legal Stud. 83 (1977).

[7] 82 Eng. Rep. 897 (K.B. 1647) (Aleyn 26).

[8] *See* Schlegel, *supra* note 6, at 420; *see also* Posner & Rosenfield, *supra* note 6, at 97.

Taylor v. Caldwell [9] considerably relaxed the doctrine of absolute liability. In that case, a promoter contracted with a music hall owner for the use of the hall. The owner was unable to perform because the hall burned to the ground before the first scheduled performance. The court disallowed the promoter's claim for breach on the theory that the continued existence of the hall was an implied condition precedent to the defendant's duty to perform.

The doctrine of implied conditions eventually found its way into American jurisprudence. In *Mineral Park Land Co. v. Howard*,[10] a contractor promised to remove gravel which in large part was found, after the date of contracting, to be below water level and thus prohibitively expensive to extract. The contractor did not remove the submerged gravel. In the suit for breach, the court reasoned that the continued existence of the gravel was an implied condition to the duty to perform, and that the difficulty of removing it made the gravel, as a practical matter, nonexistent. The court therefore excused the contractor's nonperformance. The doctrine of impossibility also appeared in the first Restatement of Contracts, which defined impossibility to include "not only strict impossibility but impracticability because of extreme and unreasonable difficulty, expense, injury or loss involved."[11]

Possibly in response to the fictional nature of the implied condition analysis, courts also developed the doctrine of frustration of purpose, beginning with the famous English coronation cases of 1903.[12] This doctrine applies in circumstances where performance, although still possible, will not effect the parties' mutual intent.

The Uniform Sales Act[13] embodied neither the impracticability nor the frustration doctrine. Thus, section 2-615 of the Uniform Commercial Code represented the first codification of these concepts in this country. However, section 2-615 has since had a pervasive influence; its impact is evident in the language of the Second Restatement of Contracts[14] and

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[9]122 Eng. Rep. 309 (Q.B. 1863).

[10]172 Cal. 289, 156 P. 458 (1916).

[11]RESTATEMENT OF CONTRACTS § 454 (1932).

[12]*See* Krell v. Henry, 2 K.B. 740 (1903). *See also* Lloyd v. Murphy, 25 Cal. 2d 48, 153 P.2d 47 (1944).

[13]Prior to the enactment and adoption of the U.C.C., "most commercial transactions [had] been regulated by a number of Uniform Laws prepared and promulgated by the National Conference of Commissioners on Uniform State Laws." The Uniform Sales Act was one such uniform law regulating many commercial sales transactions. General Comment of National Conference of Commissioners on Uniform State Laws and the American Law Institute to the Uniform Commercial Code 1978 Official Text.

[14]RESTATEMENT (SECOND) OF CONTRACTS § 261 (1979). That section states:

> Where, after a contract is made, a party's performance is made impracticable without his fault by the occurrence of an event the non-occurrence of which was a basic assumption on which the contract was made, his duty to render

in the recently-drafted United Nations Convention on Contracts for the International Sale of Goods.[15]

III. The Goals of an Interpretation of Section 2-615

A. Interpretation Should Be Consistent with the Language of the Statute

The premier canon of statutory construction is that the interpretation should be true to the language of the statute.[16] In stark contrast, very few judicial interpretations are wholly consistent with the language of section 2-615(a); most focus only on selected portions of the section and a few ignore the language entirely. As will be demonstrated,[17] some opinions discuss the meaning of "contingency," and a great number discuss the meaning of "impracticable," both of which appear in the statute. However, almost no cases have carefully analyzed the words "the non-occurrence of which was a basic assumption on which the contract was made." Instead, many decisions focus on the words "unforeseen" or "unforeseeable," even though these words appear nowhere in the text of the statute. The word "unforeseen" appears only in official comments 1 and 4 to section 2-615, and the word "unforeseeable" is entirely absent.

B. Consistency with the Intent of the Drafters

A second goal of statutory interpretation is that the interpretation be consistent with the intent of the drafter.[18] While the drafter's intent is not always easily ascertained, there is evidence that Professor Llewellyn had in mind a considerably broader scope for section 2-615(a) than the courts have permitted.

The most obvious manifestation of Llewellyn's intent appears in the tenor of the official comments to section 2-615. Taken together, they consistently advance a broad reading of the statute. For example, official comment 2 notes that "[t]he present section deliberately refrains from any effort at an exhaustive expression of contingencies and is to be

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that performance is discharged, unless the language or the circumstances indicate the contrary.

[15]United Nations Conference on Contracts for the International Sale of Goods, Article 79. 834 U.N.T.S 169, U.N. Doc. A/Conf. 97/18 (1980).

[16]This is usually stated as the "plain-meaning" rule. *See* Sutherland, Statutory Construction § 46.01 (1973).

[17]*See infra* notes 37-100 and accompanying text.

[18]*See* Sutherland, Statutory Construction § 48.12 (1973), regarding the appropriateness of reference to the official comments in interpreting the U.C.C.

interpreted in all cases sought to be brought within its scope in terms of its underlying reason and purpose."[19] Official comment 3 states in the second sentence that "[t]he additional test of commercial impracticability (as contrasted with 'impossibility,' 'frustration of performance' or 'frustration of the venture') has been adopted in order to call attention to the commercial character of the criterion chosen by the Article."[20]

Official comments 5 and 6 embody Llewellyn's most dramatic departure from the past with the suggestion that a party claiming excuse turn over rights to the buyer (comment 5), and with the notion of loss-splitting (comment 6). Official comment 7 notes that "[t]he failure of conditions which go to convenience or collateral values rather than to the commercial practicability of the main performance does not amount to a complete excuse. However, good faith and the reason of the present section and of the preceding one may properly be held to justify and even to require any needed delay involved in a good faith inquiry seeking a readjustment of the contract terms to meet the new conditions."[21]

Official comment 10 states:

> Following its basic policy of using commercial practicability as a test for excuse, this section recognizes as of equal significance either a foreign or domestic regulation and disregards any technical distinctions between "law," "regulation," "order" and the like. Nor does it make the present action of the seller depend upon the eventual judicial determination of the legality of the particular governmental action. The seller's good faith belief in the validity of the regulation is the test under this Article and the best evidence of his good faith is the general commercial acceptance of the regulation.[22]

Finally, official comment 11 advocates a liberalization of the law with respect to allocation by noting that "[s]ave for the extra care thus required by changes in the market, this section seeks to leave every reasonable business leeway to the seller."[23]

These excerpts are, of course, comments only, and do not carry the weight of statutory text. Nonetheless, it is evident that Professor Llewellyn intended the excuse defense to be available in a far greater range of circumstances under section 2-615(a) than contemplated previously. This is clear from the expansion of "triggering" devices to include impracticability, the sweeping away of technical distinctions concerning which

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[19]U.C.C. § 2-615 (1978), Official Comment 2.
[20]*Id.* at official comment 3.
[21]*Id.* at official comment 7.
[22]*Id.* at official comment 10.
[23]*Id.* at official comment 11.

laws and regulations are adequate to excuse nonperformance, and the grant of "every reasonable business leeway" to the allocating seller.

In a noteworthy article,[24] Professor Spies confirms this hypothesis. Professor Spies had access to Llewellyn's handwritten notes at the University of Chicago, and those notes support the inference in the official comments that the scope of "excuse" protection was intended to be expanded broadly in section 2-615(a). Indeed, after discussing the genesis of section 2-615(a), Professor Spies stated:

> Assuming that the provision is commercially justifiable and that it is inspired by cases which are the more commercially sound, it is nevertheless difficult to envision its potential range of operation. For one thing, the very definition of "presupposed conditions" may become controversial: what result where technological change debases every expectation of the buyer's need for or the seller's expectation of supplying the subject matter? The examples given in the [official comments] suggest that the conditions intended to be covered must be something more prosaic, although the cases cited in [Llewellyn's unpublished notes] suggest that Professor Llewellyn was seeking the widest possible application of this section.[25]

Instead, Professor Spies noted that section 2-615(a) also apparently intended to sanction the parties' "exemption" clauses, and one reasonable inference to draw from this sanction is that Llewellyn intended through section 2-615(a) to afford like protection in cases where no explicit clause existed.[26]

As further evidence of the sweeping change which section 2-615(a) was intended to effect, Professor Cosway stated:

> The important point is, though, that the broad concept of *impracticability* as an excuse staggers the imagination of anyone accustomed to the limited excuses now recognized. A disservice to the Code results from seeking an equivalence to things past. It will remain for the courts to give specificity to this word, but they must strive not to be limited by the older decisions.[27]

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[24]Spies, *Article 2: Breach, Repudiation And Excuse*, 30 Mo. L. Rev. 225 (1965).

[25]*Id.* at 255.

[26]*Id.* A number of authors have tried their hand at such clauses in print. *See* Duesenberg, *"Impossibility": It Isn't Good Code Language*, 1 J. L. & Com. 29 (1981). *See also* Prance, *Energy Contract Planning: Allocating the Risks and Consequences of Commercial Impracticability*, 3 Hastings Int'l & Comp. L. Rev. 435 (1980). Certainly, if Llewellyn's intent was to provide in section 2-615(a) protection akin to that in clauses such as these articles suggest, section 2-615(a) should be given the broadest possible interpretation.

[27]Cosway, *Sales — A Comparison of the Law in Washington and the Uniform Commercial Code*, 36 Wash. L. Rev. 50, 91 (1961).

C. Ratification of Commercial Practice and Liberalization of Law

Section 1-102 of the Uniform Commercial Code states that "[t]his Act shall be liberally construed and applied to promote its underlying purposes and policies."[28] In subparagraph (2), the same section notes that the underlying purposes and policies of the Act are "(a) to simplify, clarify and modernize the law governing commercial transactions; [and] (b) to permit the continued expansion of commercial practices through custom, usage and agreement of the parties . . . ."[29]

This liberal intent has been honored, by and large, in a number of other areas where the drafters of the Code made sweeping changes. In the area of contract formation, for example, sections 2-204 and 2-207 represent a dramatic departure from pre-Code law and facilitate considerably the finding that a contract exists.[30] The rationale for these liberal sections is that they reflect commercial reality; that is, business people entering into contracts do not know or care about, for example, the mirror image rule, and do not wish to be bound by it or be the beneficiary of it.[31] Sections 2-204 and 2-207 simply ratify commercial practice so that the law will be consistent with it.

While there are a number of cases in which courts have misinterpreted those sections,[32] these sections have not met with the widespread hostility accorded section 2-615(a). In fact, section 2-615(a) is, or should be, no different. Like the sections on formation, it simply attempts to make the law consistent with commercial reality and the commercial reality is (or at least the drafters thought it was) that business people view themselves as being excused from the duty to perform a contract in a considerably wider range of circumstances than the law has historically recognized. Section 1-102 therefore calls for a considerably more liberal reading of section 2-615(a) than the courts have granted to date.

Finally, the limited empirical research with respect to section 2-615 suggests that the section, as interpreted and applied, is considerably more restrictive than normal business practices routinely followed. Unfortunately, the research is confined to study of the practices of chemical companies in matters of allocation, and not with respect to the basic triggering contingencies which permit section 2-615(a) to take effect. The

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[28]U.C.C. § 1-102 (1978).

[29]*Id.*

[30]Section 2-204 allows for the finding of a contract where, under pre-Code law, the contract could fail for indefiniteness. Section 2-207 concerns what had commonly been referred to as the "battle of the forms" problem and upholds the finding of contracts even though the terms of the acceptance do not mirror those of the offer.

[31]*See, e.g.*, Comment 2 to Section 2-207, which states: "Under this article a proposed deal which in commercial understanding has in fact been closed is recognized as a contract."

[32]The most notorious is Roto-Lith Ltd. v. F.P. Bartlett & Co., 297 F.2d 497 (1st Cir. 1962).

research nonetheless suggests that business executives would accord section 2-615 considerably greater latitude than have the courts to date.[33]

D. Economic Analysis

In an address to a conference of teachers of contract law in 1981, the late Professor Grant Gilmore issued a call for "an economic analysis nonproliferation treaty."[34] Notwithstanding this most eminent authority, the doctrine of commercial impracticability is ideally suited to the application of economic theory. As Posner and Rosenfield view the interrelation of economics to contract theories, every impracticability case presents the basic problem of deciding who should bear the loss resulting from an event which has rendered performance by one party unprofitable. If the parties' contract does not allocate this loss explicitly, contract law should do so in the fashion that the parties themselves would have adopted had they negotiated the point. Because the object of voluntary exchange is to increase efficiency, the parties would have agreed to the most efficient allocation of the risk. Therefore, if the purpose of contract law is to enforce the desires (known or hypothesized) of the parties, the proper criterion for allocating the risk is that of economic efficiency. Indeed, if the rules are not efficient, the parties will contract around them.[35]

Posner and Rosenfield further argue that if "impracticability" is to be defined consistent with economic efficiency, the risk of loss should be placed upon the party best able to prevent the loss or insure against it. Rephrasing this concept in the terminology of section 2-615(a), the court should declare a promisor's performance "impracticable" if the promisee could less expensively than the promisor have prevented or insured against the loss resulting from nonperformance.[36]

Significantly, a few decisions have attempted this analysis without using the economist's vocabulary.[37] Also, Professor Speidel has begun an attempt, which Posner and Rosenfield did not, to integrate economic analysis with the textual mandates of section 2-615(a), although the focus of Professor Speidel's work clearly lies elsewhere.[38]

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[33]White, *Contract Law in Modern Commercial Transactions, An Artifact of Twentieth Century Business Life*?, 22 WASHBURN L.J. 1 (1982).

[34]Kelso, *The 1981 AALS Conference on Teaching Contracts: A Summary and Appraisal*, J. LEGAL EDUC. 616, 642 (1982).

[35]*See* Posner & Rosenfield, *Impossibility And Related Doctrines In Contract Law: An Economic Analysis*, 6 J. LEGAL STUD. 83, 86-89 (1977).

[36]*Id.* at 91-92.

[37]*See* Transatlantic Financing Corp. v. United States, 363 F.2d 312, 319 (D.C. Cir. 1966).

[38]*See* Speidel, *Excusable Nonperformance In Sales Contracts: Some Thoughts About Risk Management*, 32 S.C.L. REV. 241, 254-71 (1980).

The use of economic efficiency as a criterion for allocation of risk is, of course, not novel. But economic analysis is a powerful and compelling tool in an area where the parties' *ex ante* intent is to increase efficiency, and parties are free to contract around an unacceptable risk allocation imposed by law, provided the economic analysis is not inconsistent with such traditional criteria as the language of the statute and the intent of its drafter.

IV. Uniform Commercial Code Case Development

Many commentators believe that the courts have gutted section 2-615(a), affording relief by excusing performance in only the most extreme circumstances.[39] A review of the decisions supports this conclusion and dramatizes how far the decisions have strayed from the bold vision of section 2-615(a) advanced by Llewellyn and the early commentators. This section reviews and comments upon some of those decisions.[40]

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[39]*See, e.g.*, Duesenberg, *"Impossibility": It Isn't Good Code Language*, 1 J. L. & Com. 29 (1981).

[40]Several cases will be excluded from discussion in this section because these decisions were based upon considerations other than the courts' interpretation of section 2-615(a). These include cases where relief for commercial impracticability was granted or denied based upon express language in the contracts — in short, where the parties have chosen to supplant section 2-615 and the courts have honored that choice. *See* Interpetrol Bermuda Ltd. v. Kaiser Aluminum Int'l, 719 F.2d 992 (9th Cir. 1983); Gulf Oil Corp. v. Fed. Power Comm'n, 563 F.2d 588 (3d Cir. 1977), *cert. denied*, 434 U.S. 1062 (1978), *petition for cert. dismissed*, 435 U.S. 911 (1978); Tennessee Valley Auth. v. Westinghouse Elec. Corp., 69 F.R.D. 5 (E.D. Tenn. 1975); Intermar, Inc. v. Atlantic Richfield Co., 364 F. Supp. 82 (E.D. Pa. 1973); Gold Kist, Inc. v. Stokes, 138 Ga. App. 482, 226 S.E.2d 268 (1976); Swift Textiles, Inc. v. Lawson, 135 Ga. App. 799, 219 S.E.2d 167 (1975). This approach is consistent with the language of the Uniform Commercial Code which provides in section 1-102(3) that "[t]he effect of provisions of this Act may be varied by agreement . . . ." In fact, the opening line of section 2-615 states that the section applies "[e]xcept so far as a seller may have assumed a greater obligation . . . ." Professor Hawkland argues persuasively that the seller is also free to assume contractually a lesser obligation. *See* Hawkland, *supra* note 3.

A second group of decisions denied relief where the contingency that was the basis for the claim was attributable to the party invoking section 2-615(a) for relief. *See* RothSteel Prod. v. Sharon Steel Corp., 35 U.C.C. Rep. Serv. (Callaghan) 1435 (6th Cir. 1983); Jennie-O Foods, Inc. v. United States, 580 F.2d 400 (Ct. Cl. 1978); Chemetron Corp. v. McLouth Steel Corp., 381 F. Supp. 245 (N.D. Ill. 1974), *aff'd*, 522 F.2d 469 (7th Cir. 1975). This point is discussed further in the text, but it can be noted that it is axiomatic that a party should not be entitled to benefit from or claim excuse on the basis of its own misdeeds.

A third set of opinions denied section 2-615(a) relief because such relief was requested in a motion for summary judgment and there remained unresolved issues of fact. *See* Zidell Explorations, Inc. v. Conval Int'l, Inc., 37 U.C.C. Rep. Serv. (Callaghan) 466 (9th Cir. 1983); Mishare Constr. Co., Inc. v. Transit-Mixed Concrete Corp., 365 Mass. 122, 310 N.E.2d 363 (1974); Michigan Bean Co. v. Senn, 93 Mich. App. 440, 287 N.W.2d 257 (1979); Lipsett Indus. Corp. v. Barth Smelting & Refining Corp., 17 U.C.C. Rep.

A. The Easy Cases

A few cases in which the court has granted the seller relief involve objective impossibility in which a court would excuse nonperformance under any standard articulated subsequent to *Taylor v. Caldwell*.[41] In the earliest case, *Low's Ezy Fry Potato Co. v. J.A. Wood Co.*,[42] the seller promised to sell three-inch potatoes from a specified crop to the buyer. The crop produced no three-inch potatoes, through no fault of the seller. Under an articulated theory of implied condition, the court excused the seller's nonperformance and denied the buyer's claim for breach. In *Goddard v. Ishikawajima-Harima Heavy Industries Co.*,[43] the defendant-seller contracted to manufacture boats for sale to the plaintiff-buyer. The defendant's only manufacturing facility was completely destroyed by fire, and the court summarily denied the plaintiff's claim for breach, citing section 2-615(a) without discussion.[44]

Serv. (Callaghan) 406 (N.Y. Sup. Ct. 1975); Gay v. Seafarer Figerglass Yachts, Inc., 14 U.C.C. Rep. Serv. (Callaghan) 1335 (N.Y. Sup. Ct. 1974); Glassner v. Northwest Lustre Craft Co., Inc., 39 Or. App. 175, 591 P.2d 419 (1979).

The remaining excluded decisions are those in which agricultural sellers have claimed excuse because of crop failure. These decisions unanimously draw upon the first paragraph of official comment 9 to section 2-615 which states:

> The case of a farmer who has contracted to sell crops to be grown on designated land may be regarded as falling either within the section on casualty to identified goods or this section, and he may be excused, when there is a failure of the specific crop, either on the basis of the destruction of identified goods or because of the failure of a basic assumption of the contract.

U.C.C. § 2-615, comment 9 (1978). These cases thus hold that nonperformance is excused under section 2-615(a) or section 2-613 if the seller has contracted to sell crops grown on designated land and a contingency destroys those crops. On this basis, the courts have granted relief in three cases, *see* Paymaster Oil Mill Co. v. Mitchell, 319 So. 2d 652 (Miss. 1975)(section 2-617 case); Duinavant Enter., Inc. v. Ford, 294 So. 2d 788 (Miss. 1974); Campbell v. Hostetter Farms, Inc., 380 A.2d 463 (Pa. Super. 1977), and denied relief in seven, *see* Ralston Purina Co. v. McNabb, 381 F. Supp. 181 (W.D. Tenn. 1974); Ralston Purina Co. v. Rooker, 346 So. 2d 901 (Miss. 1977); Bunge Corp. v. Miller, 381 F. Supp. 176 (W.D. Tenn. 1974); Simo Grain Co. v. Oliver Farms, Inc., 530 S.W.2d 256 (Mo. App. 1975); Bliss Produce Co. v. A.E. Albert & Sons, Inc., 35 A.D. 742, 20 U.C.C. Rep. Serv. (Callaghan) 917 (N.Y. App. Div. 1976); Deardorff-Jackson Co. v. Nat'l Produce Distrib., Inc., 26 A.D. 1309, 4 U.C.C. Rep. Serv. (Callaghan) 1164 (N.Y. App. Div. 1967); Colley v. Bi-State, Inc., 586 P.2d 908 (Wash. App. 1978). One can criticize the opinions in the seven denials for failure to go beyond the language of official comment 9 and inquire whether, under the contractual analysis discussed in the text that follows, the seller might not still be entitled to relief. Such inquiry is, however, beyond the scope of this Article.

[41] 122 Eng. Rep. 309 (Q.B. 1863).

[42] 26 Agric. Dec. 583, 4 U.C.C. Rep. Serv. (Callaghan) 483 (1967).

[43] 29 A.D.2d 754, 287 N.Y.S.2d 901 (1968).

[44] *See also* Process Supply Co., Inc. v. Tunstar Foods, Inc., 38 Agric. Dec. 583, 4 U.C.C. Rep. Serv. (Callaghan) 483 (1967), where the seller made a later delivery of potatoes to the buyer suing for breach because the defendant's delivery truck was forced off the

B. Courts' Reliance on Pre-Code Law

A second group of seller victories is considerably less clear in its focus. While none of the decisions in this group involves a case of outright impossibility, none of the decisions articulates an expansive interpretation of section 2-615(a). In *SCA International, Inc. v. Garfield & Rosen, Inc.*,[45] a suit for nonpayment, the defendant counterclaimed for the plaintiff's failure to deliver imported shoes. The plaintiff argued that it was unable to deliver the shoes from its Italian manufacturer because of floods in Italy. It is implicit in the court's opinion that the delay was excused by the floods, although the court never made that point explicit or explained its reasoning. The court did, however, find that the seller had breached the contract, but only awarded nominal damages to the defendant.[46]

In *Mansfield Propane Gas Co. v. Folger Gas Co.*,[47] a buyer against whom a seller had invoked section 2-615(a) claimed to be entitled to a preferential allocation under section 2-615(b) because this buyer, unlike the seller's other customers, had a written contract. This court denied the claim, but implicit in the denial was the court's recognition that the seller's cutback was justified under section 2-615(a). It is not clear that the buyer even contested that threshold point.[48]

There are two noteworthy cases in this seller victory category

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road by the police because of bad weather conditions. The court granted the seller's request and excused non performance under section 2-615(a). In another case, Waldinger Corp. v. Ashbrook-Simon-Hartley, Inc., 564 F. Supp. 970 (C.D. Ill. 1983), the defendant failed to perform a contract to build a pump to specifications furnished by a designer chosen by the plaintiff. The defendant established that the pump was impossible to build with those specifications. The defendant plead section 2-615(a) to the plaintiff's claim for breach and won.

[45]337 F. Supp. 246 (D. Mass. 1971).

[46]While this case is included under the subsection on "sellers' victories," technically, the case should be considered as only a quasi-seller victory because the seller-plaintiff in the action was found in breach of the contract as alleged in defendant's counterclaim. However, the defendant was only awarded nominal damages for the breach for failing to prove the extent of damages caused by the breach.

[47]231 Ga. 868, 204 S.E.2d 625 (1974).

[48]*See also* Foster Wheeler Corp. v. United States, 513 F.2d 588 (Ct. Cl. 1975), where the plaintiff contracted to perform a project which later became literally impossible. The contractor was not arguing section 2-615(a) to a claim of breach, but instead argued that it was entitled to some compensation from the government for what it had done. The court granted relief and implied in its opinion that the duty to perform further was discharged by the impossibility.

In the last case, Olson v. Spitzer, 257 N.W.2d 459 (S.D. 1977), the buyer sued the seller for failure to deliver a combine. The trial court, affirmed on appeal, found that the contract explicitly excused the defendant from delivering if combines were not available, and that that clause in conjunction with section 2-615(a) afforded the seller relief. On appeal, the court said in dicta that section 2-615(a) alone would have sufficed to excuse performance.

in which the courts have discharged the seller. In *Eastern Airlines, Inc. v. McDonnell Douglas Corp.*,[49] Eastern sued McDonnell Douglas for losses it incurred as a consequence of the seller's late delivery of DC-9 commercial airliners. The defendant offered a number of reasons for the late delivery, including that it was pressured by the government, both informally and under the Defense Production Act priority system, into delaying output of commercial jetliners in order to hasten production of planes for the Air Force to use in Vietnam. McDonnell Douglas argued that this informal action qualified under the "excusable delay" clause in the contract to discharge its duty of timely delivery. The defendant-seller's arguments were unsuccessful at trial but successful on appeal. The court's opinion mentioned section 2-615(a) but placed greater reliance on the contract clause.

The last, and by far the most remarkable, of the seller victory cases is *Aluminum Company of America v. Essex Group, Inc.*[50] Under the contract between Alcoa and Essex, Essex promised to deliver alumina to Alcoa, and Alcoa promised to convert the alumina to molten aluminum and return it to Essex. The price charged by Alcoa for the conversion service was established by a formula, part of which was fixed for the fifteen-year life of the contract and part of which escalated over time with changes in the Wholesale Price Index. The plaintiff's costs of operation that were intended to be recaptured under the escalated price provisions of the contract far outstripped increases in the Wholesale Price Index, such that plaintiff's costs of performance exceeded the price under the contract.

Alcoa first argued that the duty to perform was discharged because both parties operated under a mutual mistake of fact in entering the contract, that is, that the plaintiff's escalating costs would change consistently with changes in the Wholesale Price Index. The court accepted this argument, an argument which must surely have been prompted by the Alcoa attorneys' survey of the limited relief historically provided by section 2-615(a).

Alcoa's second claim — commercial impracticability — also met with a favorable response, although the court saw the contract as one for the rendition of services governed not by the Uniform Commercial Code but by the Restatement of Contracts. The court held that the non-occurrence of the discrepancy between the Wholesale Price Index and Alcoa's costs was a basic assumption on which the parties had entered into the contract.

The court's findings in the area of relief were even more novel, as the court in essence ordered a loss splitting arrangement by which Alcoa

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[49]532 F.2d 957 (5th Cir. 1976).

[50]499 F. Supp. 53 (W.D. Pa. 1980).

would bear any future cost increases resulting from risks of the type it had agreed to assume under the contract, and Essex would bear the rest. In so splitting the loss, the court followed a suggestion in official comment 6 to section 2-615, but one which finds no support in the text or in any previous (or subsequent) decision.

Of the two landmark seller relief cases, *Eastern Airlines* is somewhat tainted because of the court's reliance on the contract provision; only *Alcoa* represents a clear break from the past. The bleak reality therefore emerges that the number of cases in which relief has been granted according to section 2-615(a) is small, and that the circumstances under which relief has been accorded are little different, if at all, from those in which relief was granted prior to section 2-615(a)'s enactment.

C. Relief Denied Under Section 2-615

A survey of the opinions in which relief has not been granted lends further weight to this conclusion. At the outset, there are certain cases which appear to be correctly decided by any modern standard. In *Center Garment Co., Inc. v. United Refrigerator Co.*,[51] a seller of acetate failed to deliver to the buyer when the defendant's contemplated source of supply failed. The defendant's attempted invocation of section 2-615(a) failed, in part because it was not clear that the source had been specified in the contract, and it was even less clear that the defendant had attempted to procure from other sources.[52]

In another case, *In re Westinghouse Electric Corp. Uranium Contracts Litigation*,[53] the defendant-uranium supplier breached its contract with the plaintiff-utility to remove spent nuclear fuel. The court rejected the defendant's claims of impracticability (because performance was not unduly expensive) and unforeseen contingency (because disposition of

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[51]369 Mass. 633, 341 N.E.2d 669 (1976).

[52]*See also* Nora Springs Cooperative Co. v. Brandau, 247 N.W.2d 744 (Iowa 1976), where the plaintiff-buyer of corn argued that it was excused from its duty to purchase by the unavailability of rail cars to transport the corn. The court held that a buyer could invoke section 2-615(a), but that in this case the buyer had failed to prove that transport was unavailable at all, much less that alternatives would have been impracticably expensive. Fratelli Gardino S.P.A. v. Caribbean Lumber Co., Inc., 447 F. Supp. 1337 (S.D. Ga. 1978), *aff'd*, 587 F.2d 204 (5th Cir. 1979), also involved a claim of failure of transportation, here by a seller, which the court rejected because the plaintiff did not prove the assertion. Another case, Frank B. Bozzo, Inc. v. Electric Weld Division, 283 Pa. Super. 35, 423 A.2d 702 (1960), involved a breach by a seller of a contract to supply steel mesh. The seller argued that it had been cut back by its source and that the court should therefore excuse performance under section 2-615(a). The court rejected the argument because the contract nowhere specified the seller's source of supply because it appeared that the seller did have enough material to supply this buyer at an earlier time but had used it for other purposes, and because other sources of supply were available.

[53]U.C.C. Rep. Serv. (Callaghan) 930 (E.D. Va. 1981).

nuclear waste was so speculative at the time of contracting that none of the contingencies which ultimately befell the seller could be said to have been beyond its contemplation). While the court's findings on impracticability and unforeseen contingencies could be challenged individually, the contract between the parties made it utterly clear that Westinghouse was aware of the manifold risks it was taking by venturing into this unknown area, and it was prepared to assume those risks in order to secure the sale. In short, the parties unmistakably allocated the risks to Westinghouse.

The remaining "seller loss" opinions are roughly divisible into decisions in which the courts ruled that the seller's increased costs were not sufficient to render performance "impracticable," as contrasted with decisions in which the court rejected the seller's claim of a "contingency" because the disabling event was in some fashion foreseeable or foreseen by the party seeking relief. Some of the decisions involve both elements.

1. Increased Cost Not Rendering Performance Impracticable. — The "increased cost" cases are not by themselves startling and probably represent no departure from the result that would have obtained before section 2-615(a) was enacted. For that reason alone, however, they present vividly the considerable gap between section 2-615(a)'s promise and its performance as interpreted by the courts. The cases are open to criticism not only on that ground, but also because they articulate no principled basis for deciding where to draw the line of "impracticability."

In one case, *Transatlantic Financing Corporation v. United States*,[54] the plaintiff ship operator contracted to carry grain from the United States to Iran in 1956. The closing of the Suez Canal necessitated the ships taking a longer route than that originally contemplated. The operator sued the shipper for its extra expense. This is not a classic commercial impracticability case because the plaintiff did not invoke commercial impracticability as a defense to a claim for breach, but instead as a basis for extra remuneration. *Transatlantic Financing* is not even literally a section 2-615(a) case because the U.C.C. was not in force at that time in the jurisdiction. The court nonetheless relied heavily on the phraseology of section 2-615(a), and the case has stood as something of a landmark ever since. The court ultimately ruled that an increased cost of approximately $44,000 did not render performance "impracticable" in a contract where the contract price was $305,000.[55]

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[54]363 F.2d 312 (D.C. Cir. 1966).

[55]In accord, and not citing to section 2-615(a), is Natus Corp. v. United States, 371 F.2d 450 (Ct. Cl. 1967), where a government contractor pled impracticability because of increased cost. The court denied relief with the assertion that it would be granted only where performance "*would be economically unrealistic.*" *Id.* at 457 (emphasis added). In Eastern Airlines v. Gulf Oil Corp., 415 F. Supp. 429 (S.D. Fla. 1975), Gulf failed to sustain its burden of proving impracticability because it did not know and could not prove

Hancock Paper Company v. Champion International Corporation[56] presents an unusual set of facts in which the seller sued the buyer for goods sold and the buyer argued that its inability to pay was excused by section 2-615(a) because, upon reselling the goods purchased from seller, the buyer lost money in a depressed market. The court made light work of the buyer's claim; significantly, the buyer offered no compelling proof of its loss.

Returning to a common fact pattern, the defendant in *Luria Brothers & Co. v. Pielet Brothers Scrap Iron & Metal, Inc.*[57] attempted to excuse its failure to deliver scrap metal under section 2-615(a), arguing that the contemplated source had failed and that it would be prohibitively expensive to resort to other sources. The court denied relief, although once again there is scant information as to the increased cost the defendant actually suffered.[58]

One last such case is *Louisiana Power & Light Co. v. Allegheny Ludlum Industries, Inc.*,[59] in which the seller failed to deliver condenser tubing to the buyer because, as argued, its performance had become commercially impracticable because of rising costs resulting in a thirty-eight percent excess of cost over price under the contract. The court held that this was insufficient to trigger section 2-615(a), noting also that the division producing the condenser tubing continued to make a profit. As in *Gulf Oil*, the overall profits of the defendant attempting to invoke 2-615(a) prejudiced the defendant's claim. However, there does not appear to be any support for this analysis of examining overall profitability in the text of section 2-615(a); in contrast, section 2-615 focuses on whether performance "as agreed" and "under a contract" is impracticable.

At one level, the cost overrun cases in which relief has been denied are not troublesome. There do not appear to be any cost overruns of the magnitude of the ten-fold increase sufficient for relief in *Mineral Park Land Company v. Howard*,[60] and it appears that in the most

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its alleged increased costs, all at a time when corporate profits from all of the company's operations were at record highs. The court also said, in dicta, that the Arab oil embargo of 1972 prompting the alleged cost increase was foreseeable at the time the contract was executed and that this too would have barred relief. *See Aluminum Company of America*, 449 F. Supp. at 76, where the court attacked the reasoning employed by the *Eastern Airlines* court.

[56] 424 F. Supp. 285 (E.D. Pa. 1976).

[57] 600 F.2d 103 (7th Cir. 1979).

[58] A similar result (and lack of data) occurs in Alamo Clay Products, Inc. v. Gunn Tile Company of San Antonio, Inc., 597 S.W.2d 388 (Tex. Civ. App. 1980). The defendant-seller was also unsuccessful in Bernina Distributors, Inc. v. Bernina Sewing Machine Co.,646 F.2d 434 (10th Cir. 1981), where the increased cost of performance was due to the devaluation of the dollar (but again no specific numbers were given).

[59] 517 F. Supp. 1319 (E.D. La. 1981).

[60] 172 Cal. 289, 156 P. 458 (1916).

egregious of cost overrun cases, *Alcoa v. Essex*,[61] the court recognized commercial impracticability and granted relief.

Conversely, however, the cost overrun cases make no vivid departure from prior law as they arguably should. Worse still, they have virtually no precedential value because it is utterly unclear at which point the court will draw the line of "impracticability" and decide where the seller's discomfort is sufficient. This is clearly contrary to any notion that the cases should enhance the statute's certainty and clarity as an aid to private settlement and negotiation.

2. "Unforeseen," "Unforseeable," and "Unforeseeability." — The most troublesome opinions of all are those in which the courts have denied sellers relief because the contingency rendering performance impracticable was not, in the court's eyes, unforeseen or unforeseeable. These opinions illustrate well the often ludicrous results that occur when the courts make their most troublesome and common analytical mistake, that of requiring "unforeseeability" of the contingency in any form as one of the tests for seller's relief. The requirement is impossible to satisfy under any reasonable reading of "unforeseen" or "unforeseeable," because few things are "unforeseen" and nothing is "unforeseeable."

Presumably, this is not the intent expressed in section 2-615(a), as no variation of the word "unforeseen" or "unforeseeable" occurs in the text of the statute at all, and the only references in comments 1 and 4 are to the word "unforeseen," which is considerably narrower in scope than "unforeseeable." The word "unforeseeable" appears nowhere in the text or the comments. The other noteworthy point about these opinions is that they rarely refer to the language of the statute dealing with "contingencies the non-occurrence of which was a basic assumption" on which the contract was made.

In *United States v. Wegematic Corporation*,[62] the defendant promised to sell the government a computer for $231,800. The defendant ultimately reneged, citing technical difficulties which it claimed would take over $1,000,000 to correct. The court suggested that the possible inability to develop the technology had been foreseeable and that the plaintiff assumed the risk of such inability. While the case is laudable in attempting to answer the Posner and Rosenfield inquiry of who is best able to prevent or insure against the loss, the court's conclusion that the promisor assumed the risk is completely unsupported, certainly when compared to the much more complete analysis of a similar point in the *Westinghouse* case.[63]

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[61] 499 F. Supp. 53 (W.D. Pa. 1980). *See supra* text accompanying note 50.

[62] 360 F.2d 674 (2d Cir. 1966).

[63] *See supra note 53 and accompanying text.*

In *Security Sewage Equipment Co. v. McFerren*,[64] the court declared a contractor in breach when the contractor did not install a sewer system in a residential development. The contractor had been unable to obtain the necessary governmental permit. The court said that only a contingency which was "unforeseen and unusual" would discharge the contractor.[65] There are many flaws in this opinion. First, if failure to obtain a permit must be "unforeseen" to constitute an excuse, there will never be an excuse because an experienced contractor must always foresee that a permit may not issue. Second, the court's conclusion that the contractor "assumed the risk" is factually unsupported and relies instead on citations from Corbin's treatise, Corpus Juris Secundum, the 1932 edition of Williston, and four non-Code cases, the most recent of which was written in 1960.[66] Finally, and most important, can anyone reasonably argue that in a modern construction project the failure to secure the necessary building permit is not a "contingency the non-occurrence of which was a basic assumption on which the contract was made"?

In *Maple Farms, Inc. v. The City of Elmira School District*,[67] the plaintiff-seller of milk sought a declaratory judgment that its performance under a contract became commercially impracticable when the market price of milk had risen twenty-three percent between the time of contracting and the time for performance. The court denied relief, finding that this contingency was "not totally unexpected"[68] and that the essence of a fixed price contract was to place the risk of advances in price on the seller.

This analysis is troublesome on two counts. First, if a contingency must be "totally unexpected" to trigger section 2-615(a), a court will rarely, if ever, turn to that section, a result that is contrary to the statute's language and legislative history. Likewise, to interpret a fixed price contract as one which unalterably puts the risk of all cost advances on the seller seems utterly to emasculate section 2-615(a), and there is no support in the text of the statute for such a holding. Moreover, there was little support in the facts of this case for concluding that the parties intended the fixed price term to effect such an allocation.[69]

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[64]14 Ohio St. 2d 251, 237 N.E.2d 898 (1968).

[65]*Id.* at 256, 237 N.E.2d at 901.

[66]*Id.* The four cases cited by the court are Shore Inv. Co. v. Hotel Trinidad, Inc., 158 Fla. 682, 29 So. 2d 696 (1947); Hein v. Fox, 126 Mont. 514, 254 P.2d 1076 (1953); Thorton v. Arlington Independent School District, 332 S.W.2d 395 (Tex. Civ. App. 1960); Fischler v. Nicklin, 51 Wash. 2d 518, 319 P.2d 1098 (1958).

[67]76 Misc. 2d 1080, 352 N.Y.S.2d 784 (1974).

[68]*Id.* at 1087, 352 N.Y.S.2d at 789.

[69]*See also* Neal-Cooper Grain Co. v. Texas Gulf Sulphur Co., 508 F.2d 283 (7th Cir. 1974), in which the plaintiff-buyer sued the defendant-seller for breach of a contract to sell potash. The defendant argued that it had closed its U.S. potash mine and was now producing the plaintiff's potash from a Canadian mine and that Canadian regulations required it to sell that potash at a minimum price in excess of the contract price. The

In *Publicker Industries, Inc. v. Union Carbide Corp.*,[70] the plaintiff-buyer sued the defendant-seller of ethanol for failure to deliver. The defendant argued that its failure to perform was excused under the explicit language of the contract and also under section 2-615(a) because it had suffered a cost increase of just under one hundred percent as a result of the Arab oil embargo of 1972 which raised prices of ethylene, one of the primary ingredients of ethanol. The court held that such a cost increase did not render performance impracticable and also that the existence of a cap on the price escalator in the contract meant that although the parties foresaw that costs would increase, the risk of *any* increase in cost, whether or not captured by the escalator, was contractually allocated to the seller. The court also stated in dicta that the Arab oil embargo was not a contingency of the sort required by section 2-615(a).[71]

This is now a familiar pattern. The court stated that, as does a fixed price, a cap on a price escalator conclusively speaks to risk allocation, a conclusion with no factual support which also largely negates section 2-615(a). Moreover, the court's conclusion that the Arab embargo of 1972 and the subsequent quadrupling of crude oil prices did not qualify under the "contingency" language is precisely the kind of harsh view that contradicts the legislative history of the section.

In *Heat Exchangers, Inc. v. Map Construction Corp.*,[72] the court considered the defendant's difficulty in obtaining parts needed for performance not to be a contingency excusing nonperformance within the contemplation of section 2-615(a), in part because the contractor acknowledged supply difficulties during the formation of the contract. From this acknowledgment and from the fact that the defendant failed to contract for an exculpatory clause, the court concluded that the contract allocated the risk of all supply difficulties to the seller.[73]

This case is typical; the Code's "contingency" requirement becomes an inquiry into "foreseeability" that metamorphosizes into one of allocation of risk. An event that is foreseeable or actually foreseen during the contract formation period is deemed then to be a risk that the parties allocated to the party victimized by the contingency if there is no clause specifically addressing it. While this is arguably what the parties intended by their silence, it is equally arguable that the parties

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court denied relief, holding that performance was merely more burdensome, and moreover, that the seller should bear the risk of the price regulations because Canadian potash sales in the past had been subject to government regulation. As in the two prior cases, the claim that there was a conscious allocation of risk had no factual support, and absent such support the sweep of the holding is sufficient to negate section 2-615(a) entirely.

[70] 17 U.C.C. Rep. Serv. (Callaghan) 989 (E.D. Pa. 1975).

[71] *Id.* at 992.

[72] 368 A.2d 1088 (Md. Ct. Spec. App. 1977).

[73] *Id.* at 1094-95.

intended *no* contractual allocation and that the parties, in typical commercial fashion, chose to be silent in hopes that the problem would not arise. This Article's quarrel with the courts in these cases is not that the parties could not have intended their silence as an allocation, but that the courts assume so with almost no evidence. This ignores the Code's history, Llewellyn's intent, and the common commercial phenomenon that difficult questions are often intentionally left unresolved in contracts, with no intent that the silence constitute an allocation of risk.

In *Iowa Electric Light and Power Co. v. Atlas Corp.*,[74] the defendant contracted to sell uranium oxide to the plaintiff for four years. The plaintiff sued for equitable relief following several delayed deliveries, and the defendant counterclaimed for reformation in light of the sevenfold increase in the market price of uranium oxide which had not been mirrored in the contract price.

The court granted the seller no relief. The court noted the language of the statute and then went on to this most unfortunate articulation of the Iowa law:

> In *Nora Springs*, *supra*, the Iowa Supreme Court noted that excuse may be available where "increased cost is due to some unforeseen contingency which alters the performance". . . . Before reaching the question of impracticability then, the court must consider whether the non-occurrence of contingencies complained of were at the heart of the contract, that is, were they foreseeable.[75]

In articulating a standard of "foreseeability," the court misread *Nora Springs* (where the standard was "foreseen"), ignored the language of Article 2, and guaranteed (as it later found) that the seller would receive no relief because, alas, everything is foreseeable.

3. The Most Troublesome of the "Unforeseen" Interpretations and Its Progeny. — The remaining cases in this category are even more discouraging than those just discussed, in part because the earliest of them occurred in 1978, when there was considerable scholarship about the alleged shortcomings of section 2-615(a) and the failure of courts properly to effect the purpose of its drafters. This Article discusses these cases in detail immediately below. The Article later re-analyzes these cases under a proposed revised analysis.

In *Barbarossa and Sons, Inc. v. Iten Chevrolet, Inc.*,[76] the plaintiff-buyer contracted with the defendant, a Chevrolet dealer, for a specially-

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[74]467 F. Supp. 129 (N.D. Iowa 1978), *rev'd on other grounds*, 603 F.2d 1301 (8th Cir. 1979).

[75]*Id.* at 134.

[76]265 N.W.2d 655 (Minn. 1978).

manufactured truck which could be used to transport and lay sewer pipe. The defendant ordered the truck from General Motors. General Motors was initially late in responding to the order and then cancelled it. When the plaintiff sued the defendant for breach, the defendant argued discharge under section 2-615(a). The court held first that the General Motors cancellation was not a contingency the non-occurrence of which was a basic assumption on which the contract was made.[77] The court then said,

> [The] second requirement of [section 2-615], similar to the common-law impossibility defense, concerns the determination of whether the risk of the given contingency was so unusual or unforeseen and would have such severe consequences that to require performance would be to grant the promisee an advantage for which he could not be said to have bargained in making the contract.[78]

The court held that the inability to secure the truck from General Motors was foreseen by Iten because it did not use its standard form contract for this order. While the standard form contract contained an "escape" clause (Iten was not liable if General Motors did not fill the order), the Iten-Barbarossa contract did not. The court concluded that "General Motors' possible cancellation of this order was one of those varieties of foreseeable risks which the parties have tacitly allocated to the seller-promisor by its failure to provide against it in its contract."[79]

In defense of the court's opinion, it is certainly possible that the "escape" clause was intentionally omitted from this custom-drafted contract as a means of expressly allocating that risk to Iten. It is equally possible, however, that the contract had to be drafted from scratch because of the unusual nature of the vehicle, and, therefore, the omission was an oversight. There was at least one other important oversight in the document: it contained no delivery date, despite the parties' clear understanding that the truck had to be delivered by April 1 to be useful to the buyer. Alternatively, the parties may intentionally have chosen not to address the possibility.

Additionally, the opinion suffers from the muddy analysis and faulty reasoning common to these cases. The court shifts with abandon from "foreseeable" to "foreseen" and imparts a wholly fictitious "second requirement" to section 2-615(a) based on the common law defense of impossibility, notwithstanding that official comment 3 to section 2-615(a) states quite clearly that the drafters used "impracticability" in a conscious attempt to escape the narrow confines of "impossibility."

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[77] *Id.* at 659.
[78] *Id.*
[79] *Id.* at 660.

Moreover, the court points to Iten's unsuccessful attempts to secure a truck from another dealer, after learning that General Motors had cancelled the order, as further evidence that the parties did not envision General Motors as the sole source of supply.[80] This conclusion ignores the fact that Iten searched for the truck at the buyer's request[81] and ignores the commercial reality that a seller would of course "scramble" in this fashion to accommodate an unhappy buyer. To use Iten's behavior against it, as the court did, also does little to encourage business accommodations in cases like this — which is contrary to the underlying purpose of the U.C.C.

The last and most fundamental objection to the decision is that it simply fails to satisfy common sense. The buyer ordered a new vehicle from a Chevrolet dealer. Could anybody seriously wonder where the Chevrolet dealer was going to get the vehicle? To say that General Motors' failure is *not* a "contingency the non-occurrence of which was a basic assumption" of the contract is a bolt from the blue, a conclusion which can be charitably described only as startling.

Following *Barbarossa*, in *Missouri Public Service Co. v. Peabody Coal Co.*,[82] the defendant-seller of coal pleaded section 2-615(a) to the plaintiff-buyer's claim for breach. The increase in the cost of production of coal which the defendant claimed as an excusing factor was caused at least in part by the 1972 Arab oil embargo, and although the contract contained numerous price escalators (and no cap as in *Publicker*), the cost so outran the escalator that performance was extremely unprofitable for the seller.

The court denied relief to the seller for two apparent reasons. First, the court dwelled at length on the extensive price escalator provisions, and the opinion implies that the court viewed these escalators as evidence that the parties had contractually allocated the risk of all cost increases to the seller.[83] In reality, such a holding simply continues the "seller loses" pattern, as such risks are also considered to have been allocated to the seller when the price is fixed (*Maple Farms*) or subject to an escalator with a cap (*Publicker*).

The decision's second disappointing, but not surprising, feature is its treatment of the Arab oil embargo of 1972. The court stated, "Such possibility was common knowledge and had been thoroughly discussed and recognized for many years by our government, media, economists and business, and the fact that the embargo was imposed during the term of the contract here involved was foreseeable."[84]

It is doubtful that the possibility of the embargo was so substantial

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[80] *Id.* at 657.

[81] *Id.*

[82] 583 S.W.2d 721 (Mo. Ct. App. 1979), *cert. denied*, 444 U.S. 865 (1979).

[83] *Id.* at 728.

[84] *Id.*

as to be a part of the parties' risk allocation thinking in 1967; the embargo was "foreseeable" five years in advance of the event only if one ascribes the broadest possible meaning to the word, that is, only if everything is considered foreseeable. This case neatly illustrates the seller's dilemma. The statutory test is whether there was a contingency the non-occurrence of which was a basic assumption on which the contract was made. The court asks instead whether the contingency was "foreseeable" and then defines "foreseeable" so broadly as to include every possible contingency.

In *Robberson Steel, Inc. v. J.D. Abrams, Inc.*,[85] the plaintiff-general contractor sued the defendant-steel fabricator for failure to deliver steel for the plaintiff's project. The defendant argued excuse under section 2-615(a) because the mill of its steel supplier had broken down. The court submitted the question to a jury, which found that an equipment breakdown ocurrence was a contingency the non-occurence of which was a basic assumption on which the contract was made. The trial court, affirmed on appeal, rendered a judgment notwithstanding the verdict, because in its view steel mill breakdowns were a contingency which the "parties could reasonably have foreseen and it was one of that variety of risks which the parties tacitly assigned to the promisor by their failure to provide for it explicitly."[86] This line of thinking is directly descended from *Paradine v. Jane*[87] and presents a new trap for the unwary seller. If relief is available only for contingencies which are contractually addressed, then there is nothing left of section 2-615(a), which exists to deal with contingencies as to which the contract is silent. Even more than others, this opinion displays a fundamental failure to understand the implications of the statute.

The fourth case is *Sunflower Electric Cooperative, Inc. v. Tomlinson Oil Co., Inc.*,[88] in which the defendant contracted to sell natural gas to the plaintiff from a specified field that subsequently failed. The plaintiff sued for breach, the defendant argued section 2-615(a), and, at trial, the defendant won. The case was reversed on appeal for the usual reasons; the court stated, "[H]aving concluded that the lack of reserves was foreseeable to [defendant], we also conclude that [defendant] assumed the risk that such would prove to be the case."[89] The court concluded that the defendant-seller had assumed the risk because, as the reader can now guess, the contract was silent. The court said that "if the event was foreseeable the parties must make provision for it in the contract or be bound."[90] And because everything is foreseeable, both

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[85]582 S.W.2d 558 (Tex. Civ. App. 1979).
[86]*Id.* at 564.
[87]82 Eng. Rep. 897 (K.B. 1647) (Aleyn 26).
[88]U.C.C. Rep. Serv. (Callaghan) 1462 (Kan. Ct. App. 1981).
[89]*Id.* at 1476.
[90]*Id.* at 1475.

in reality and also in the decisions, the seller bears the risk of all unspecified contingencies, and section 2-615 is once again nullified. It is quite remarkable that both this court and the court in *Robberson* could not step back from their handiwork enough to realize that their opinions deny section 2-615(a) the only utility it was intended to have, or ever could have — to provide for excuse when the contract is silent.

In *Record Corp. v. Logan Construction Co., Inc.*,[91] a subcontractor failed to deliver steel gates on time to the general contractor Logan because the subcontractor's supplier had gone on strike. Logan sued Record for damages caused by the delay. Record's section 2-615(a) argument fell on deaf ears. The court first noted that "there seems to be a suggestion in Comment 1 that there is a test of foreseeability involved in such a circumstance."[92] The court then compounded its error by adopting the flawed reasoning of *Robberson* and *Sunflower*:

> While Record has asserted an uninterrupted supply of extruded bronze from Anaconda since 1968, this by itself would not render a strike by Anaconda employees as unforeseeable. As pointed out . . . , we live in a union-conscious society. The use of a strike as a collective bargaining tool is not a rarity, and it would have been a simple matter to have provided for such a contingency in the contract as an excuse for a delay in performance.[93]

The final case is *Bende & Sons, Inc. v. Crown Recreation, Inc.*,[94] in which the defendant failed to perform a contract to sell boots to its customer because the boots were destroyed in a train wreck while in transit from the manufacturer to the defendant. The buyer sued for breach; the defendant attempted, without success, to invoke section 2-615(a). In a tour de force of misunderstanding, the court gave the following reasoning for rejecting the defendant's argument, reasoning which, to this author, is in error at every important point:

> Section 2-615 of the Code . . . provides an alternative excuse for non-performance. The Code reflects the common-law standard of impracticability [first error], and, as the official comment makes clear, requires that the impracticability be caused by 'unforeseen supervening circumstances not within the contemplation of the parties at the time of contract.' . . . In short, the defendant must demonstrate either that (1) the contingency that made performance commercially impracticable was not foreseeable [second error] at the time of contracting, or (2) the contract contains specific, exculpatory language excusing non-

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[91]U.C.C. Rep. Serv. (Callaghan) 1579 (Pa. D. & C.3d 1982).
[92]*Id.* at 1583.
[93]*Id.* at 1584.
[94]548 F. Supp. 1018 (E.D.N.Y. 1982).

> performance under certain circumstances . . . . The foreseeability requirement does not entail contemplation of a specific contingency; rather, it is sufficient that the contingency that eventually occurred could have been foreseen as a real possibility that would affect performance [third error]. . . . Although it does not appear that Bende and Kiffe ever contemplated a train derailment (the "specific contingency"), common sense dictates that they could easily have foreseen such an occurrence [fourth error]. . . . Inasmuch as I find that the derailment was not unforeseeable, there is no excuse for non-performance under section 2-615 unless there is specific, exculpatory language in the contract [fifth error]. . . .[95]

This, then, is section 2-615(a)'s current unhappy ending. Twenty-one years before this opinion, Professor Cosway wrote that "the broad concept of *impracticability* as an excuse staggers the imagination of anyone accustomed to the limited excuses now recognized."[96] The *Bende* opinion, however, staggers the imagination for a different reason; the case is nothing less than a judicial repeal of section 2-615.

These cases illustrate well the rampant confusion over the proper interpretation of section 2-615(a). The distorted standards of "unforeseen" and "unforeseeable" deny section 2-615(a) any effect. Moreover, to deny relief for any contingency not contractually specified utterly flies in the face of section 2-615, the very purpose of which is to provide relief when the contract is silent.

V. A Proposed New Standard

This Article next sets forth a proposed new interpretation of section 2-615(a) which is true to the language of the statute, responsive to shortcomings in the existing decisions, and supported by basic microeconomic theory. This Article proposes that the courts, in analyzing section 2-615(a), take the following analytical steps in the order presented. The analysis is somewhat cursory, but it will subsequently be applied to a number of the cases previously discussed.

A. Contractual Allocation

The courts' first inquiry should be whether the parties have contractually allocated the loss resulting from the contingency in question. The courts should not, however, accept silence as evidence of such an allocation, a notorious and unfortunate characteristic of existing opinions. Similarly, the courts should not conclude that the price term of the contract, standing alone, is such an allocation of risk.

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[95] *Id.* at 1021-22.

[96] *See supra* note 27.

A central axiom of Article 2 is that the parties are free, within certain limits, to structure their relationship as they see fit. This is recognized first in section 1-102(3), which provides that the effect of provisions "of this Act may be varied by agreement . . . ."[97] Section 1-102(4) states that the parties have this freedom whether or not the language of an individual section so indicates, for example, by including the words "unless otherwise agreed."[98] This freedom to agree is explicit in section 2-615 itself, where the opening line states "[e]xcept so far as a seller may have assumed a greater obligation . . . ."[99] In his excellent article, Professor Hawkland has noted that this language permits the seller to assume a greater *or a lesser* obligation; that is, a contingency clause in the contract may give the seller less or more protection than does section 2-615(a).[100] It seems equally clear that a contingency clause in a contract may extend protection to a buyer, which section 2-615 does not do by its terms.[101]

The notion that the parties may contract out of section 2-615(a) is consistent not only with other provisions of the Code, but also with the large number of decisions that have honored such contractual provisions.[102]

It should finally be noted that, under Article 2, the parties' agreement may be found not only in the writings, if any exist, but also in oral understandings (subject to section 2-202 on parol evidence), and the relevant course of performance, course of dealing, and usage of trade.[103]

B. Performance As Agreed

Assuming that the parties have not agreed on how the loss resulting from a contingency should be allocated, the next question is whether "performance as agreed" has been rendered impracticable. The court should use these words as a vehicle to determine precisely what the parties contracted for. This interpretation is supported and underscored by the comment dealing with contracts to sell agricultural output from specified pieces of land,[104] and the relevant cases.[105] Conversely, the

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[97]U.C.C. § 1-102(3) (1978).

[98]U.C.C. § 1-102(4) (1978).

[99]U.C.C. § 2-615 (1978).

[100]*See* Hawkland, *The Energy Crisis and Section 2-615 of the Uniform Commercial Code*, 79 COM. L.J. 75 (1974).

[101]*See, e.g.*, Nora Springs Cooperative Co. v. Brandau, 247 N.W.2d 744 (Iowa 1974).

[102]*See, e.g.*, Eastern Airlines, Inc. v. McDonnell Douglas Corporation, 532 F.2d 957 (5th Cir. 1976). Contracting out of section 2-615 is also economically efficient. *See* Posner & Rosenfield, *Impossibility and Related Doctrines In Contract Law: An Economic Analysis*, 6 J. LEGAL STUD. 83, 89 (1977).

[103]*See, e.g.*, U.C.C. §§ 1-205 and 2-208 (1978).

[104]*See* U.C.C. § 2-615, official comment 9 (1978).

[105]*See supra* note 40.

failure of one source of supply should not excuse a seller where the contract is not tied to that source explicitly or implicitly.

C. Contingency

The court's third requirement is to find that a "contingency" has occurred. Defined most broadly, a contingency could be specified as any event whatsoever. There is even an argument that an event within the control of the party attempting to invoke section 2-615(a) would qualify as a contingency; the argument is that where the drafters intended to exclude events within a party's control, they did so explicitly as in section 2-613 (Casualty to Identified Goods), which refers to "casualty without fault of either party . . . ."[106] Absent such a specific inclusion, the control of the party over the event should not be important.

This interpretation is surely too broad. A contrary and better argument is that the drafters could have used the word "event" instead of "contingency" if they wished the culpability of the invoking party to be of no moment.

A better definition of contingency, therefore, is an event reasonably beyond the control of the party attempting to invoke section 2-615. This definition implies that the party seeking relief may not be responsible for the event and must have made reasonable attempts to prevent the losses flowing from it.

D. Basic Assumption

The fourth step requires a court to find that the non-occurrence of the contingency was a "basic assumption on which the contract was made." The "basic assumption" language is simply an attempt to separate the wheat from the chaff, that is, to exclude from the scope of section 2-615(a) peripheral contingencies affecting performance of the contract. Such a separation certainly involves judicial line-drawing. But drawing lines is what courts and triers of fact exist to do and are most suited to do, and they would be no less competent drawing lines here than they would be elsewhere. Moreover, if all the opinions addressed the "basic assumption" issue on its own terms, and without substituting other language and tests, there would soon exist an instructive body of precedent useful to courts and practitioners alike.

E. Impracticability

The fifth and last step of the analysis is to find that the contingency, the non-occurrence of which was a basic assumption of the contract, has rendered performance impracticable. This is the place to introduce

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[106]U.C.C. § 2-613 (1978).

economic analysis. The court should find that performance has been rendered impracticable, and should discharge the promisor, when it can determine that the promisee is the superior bearer of the particular risk in question and in the particular circumstances of the transaction. The superior risk bearer will be the party who is better able to prevent the loss or insure against it.[107] A court should adopt this standard because it is economically efficient and because economic efficiency is appropriately the goal of an interpretation of a statute which regulates economic exchange and one which the parties may contract around if they wish.[108]

Posner and Rosenfield identify four steps to this analysis. The first step is to determine which party could, at lower cost, prevent the loss. The second, third, and fourth steps focus on who can less expensively insure against the loss. The second step is to determine which party is better positioned to predict the contingency. The third step is to determine which party could better predict how much loss would flow from the contingency. The final step is to determine which party could less expensively insure against the loss, either by market insurance or through self-insurance.

F. Foreseeability

A central thesis of this Article is that no variation of the word "foresee" should be part of the analysis at any point in the five steps set forth above. An abandonment of the standard of foreseeability by the courts would represent a dramatic but beneficial departure from the past. The element of foreseeability has taken on an enormous role in section 2-615(a) litigation, and has, in effect, emasculated the statute. The effect has been to deny relief to most parties seeking it and to leave the case law in an utter state of disorder; the only consistency in the opinions is that the seller almost always loses.[109] This is at odds with the language of the statute itself, where no variation of the word "foresee" ever appears, and with Llewellyn's basic intent to enhance the scope of protection.[110]

The specter of foreseeability has appeared at many analytical junctures in the decisions, and this Article will deal with them individually to set forth in greater detail the nature of the proposed change. The first analytical step is that a court should allocate the risk of loss

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[107]Posner & Rosenfield, *Impossibility and Related Doctrines In Contract Law: An Economic Analysis*, 6 J. LEGAL STUD. 83, 91 (1977).

[108]*Id.* at 89. *See also supra* note 35 and accompanying text.

[109]This is not wholly original. *See* United States v. Von's Grocery Co., 384 U.S. 270 (1966) (Stewart, J., dissenting), where Justice Stewart noted, regarding a line of suits brought by the government under the Clayton Act, that "the Government always wins." *Id.* at 301.

[110]*See supra* notes 23-25 and accompanying text.

according to the parties' agreement, if there has been an agreement. There are opinions which hold that a contract with a fixed price,[111] or one with a price escalator subject to a cap,[112] or one with a price escalator subject to no cap,[113] are all contracts which explicitly allocate the risk of all cost increases to the seller. The articulated theory is that the parties "foresaw" increasing costs and nonetheless did or did not put a cap on the contract prices, thus illustrating their intent that, come what may, the seller would be bound to perform regardless of cost and regardless of differences between the contract price and market price.

This conclusion is overly simplistic and flawed on three counts. First, as a simple factual matter, the fact that the parties put a cap on the contract price (or chose an escalator with no cap) does not mean, standing alone, that they "foresaw" that costs or market prices might rise. Second, even if the parties "foresaw" increasing costs or market prices, it does not necessarily mean that there was no point at which they would have agreed before the fact, if asked, to increase the contract price. Finally, the fact that a risk of increasing costs or market prices is foreseeable or even foreseen is utterly distinct from whether the parties thought it was likely and intended their contractual language to cover it. In short, no price term is, by itself, determinative of what the parties foresaw, much less of what risks they contractually allocated.

Of course, a court might determine, on the basis of extensive evidence, that a price clause in a contract was in fact the shorthand used by the parties to allocate every price and cost risk to the seller. However, almost none of the opinions is based on evidence of this magnitude, and absent such evidence, no clause standing alone is probative of such an allocation.

These comments apply also to the court's analysis of performance "as agreed." The court should use all of the tools at its disposal to determine the parties' agreement. The court should not, however, hide behind notions of "foreseeability" to conclude without further evidence that silence constituted an assumption of a risk merely because the risk concerned an event which could have been foreseen (i.e., was foreseeable) at formation of the contract.

The "foreseeability" goblin has caused the greatest damage in the determination of what is a contingency. Courts have held a number of events not to be "contingencies" because they were foreseeable.[114] The

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[111]*See, e.g.*, Maple Farms, Inc. v. City School District of the City of Elmira, 76 Misc. 2d 1080, 352 N.Y.S.2d 784 (1974).

[112]*See, e.g.*, Publicker Industries, Inc. v. Union Carbide Corp., 17 U.C.C. Rep. Serv. (Callaghan) 989 (E.D. Pa. 1975).

[113]*See, e.g.*, Missouri Public Service Co. v. Peabody Coal Company, 583 S.W.2d 721 (Mo. Ct. App. 1979), *cert. denied*, 444 U.S. 865 (1979).

[114]*See, e.g.*, Bende & Sons, Inc. v. Crown Recreation, Inc., 548 F. Supp. 1018 (E.D. N.Y. 1982), where the court found a destruction of the contracted for goods by result

threshold objection to these conclusions is that the courts should, at least, use the narrower "foreseen" language of official comments 1 and 4, instead of the much broader "foreseeable" concept which has no support in the language of either the statute or the official comments.

The second objection to "foreseeable" is that if an event fails to be a contingency because it is "foreseeable," then no event in the world is a contingency because every event in the world is foreseeable. This could not have been the drafters' intent. Similarly, if an event fails to be a "contingency" because it was "foreseen," this again is a test which can and has been used to emasculate section 2-615. The fact that a risk was foreseen does not necessarily mean that the parties decided in their contract who would bear the loss resulting from the risk; the express determination of risk is the standard that the language of the statute requires.

A few decisions take the "contingency" analysis to the remarkable length of saying that because the contingency was "foreseeable" or "foreseen," the parties could have protected against the event explicitly; the fact that the parties did not means that they intended the party on whom the loss initially falls to bear it.[115] To uphold such an argument utterly vitiates section 2-615. The argument states that the only way one can have protection is to list each and every event which will discharge the duty to perform. That could not have been the drafters' intent because section 2-615, by its terms, applies when the contract is silent.

There is no place in a court's analysis for notions of "foreseen" or "foreseeable." A court should adhere to the language of the contract, the language of the statute and the comments, and any other evidence properly available to determine the parties' agreement. But when the contract, even as broadly defined, is silent, then the court should resort to section 2-615 free of any notions of foreseeability. This change would serve two purposes. First, it would make the operation of section 2-615 clearer, to the greater benefit of future parties. Second, it would make the operation of section 2-615 somewhat more generous to sellers, consistent with its purpose and with the intent of the drafters.

VI. Reanalyzing Several of the Old Decisions

It is instructive to test this hypothetical analysis on a number of recent cases in which the court has denied a seller section 2-615(a) relief.

The first case to be so analyzed is *Barbarossa & Sons, Inc. v. Iten Chevrolet, Inc.*,[116] a 1978 Minnesota decision. To review the facts, the

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of a train derailment in shipment not to be a contingency. *See supra* notes 94-95 and accompanying text.

[115] *See, e.g.*, Bende & Sons, Inc. v. Crown Recreation, Inc., 548 F. Supp. 1018 (E.D.N.Y. 1982).

[116] 265 N.W.2d 655 (Minn. 1978).

plaintiff-buyer contracted with the defendant-seller, a Chevrolet dealer, for the defendant to deliver to the plaintiff a specially-manufactured truck. The defendant ordered the truck from General Motors. General Motors first accepted the order, then said that delivery of the truck would be late, and ultimately cancelled the order entirely, saying that it was no longer making trucks of that kind. The plaintiff sued the defendant for breach, and the defendant pleaded excuse under section 2-615(a). The defendant lost, as the court reasoned that General Motors' cancellation was not "a contingency the non-occurrence of which was a basic assumption" on which the contract was entered into, and moreover, that the cancellation by General Motors was a foreseen risk. In support of this conclusion, the court stated that the defendant attempted to procure such a truck from other dealers once General Motors cancelled the order. It noted also that some of the defendant's contracts contained a clause, absent in the instant case, stating that the dealer was not liable for nondelivery if General Motors cancelled. There was no evidence why the "escape" clause was not included in the contract with Barbarossa.

Under the proposed analysis, one would first ask whether the parties had contractually allocated the risk that General Motors would fail to perform. The better answer is no. The only evidence in favor of a contrary finding is that there was no "escape" clause in the contract. However, there was no evidence as to why the clause had been removed, or whether it was included in all, or only some, of the defendant's other dealings. It is difficult to believe that the removal of the clause was a knowing assumption of the risk by the dealer; after all, there was no other place that the dealer could possibly get such a vehicle if not from the manufacturer, given its customized nature. Whether or not the parties did allocate the risk to the dealer, there is not sufficient evidence in the opinion to support such a finding.

The next question is whether the contingency affected performance "as agreed." Assuming that the contract implicitly specified a source of supply (General Motors), performance as agreed was affected. This assumption certainly seems reasonable in a contract with a Chevrolet dealer.

The third question is whether General Motors' cancellation constituted a "contingency" that was beyond the reasonable control of the dealer. The answer is yes, inasmuch as the dealer apparently made good faith efforts to get General Motors to perform and to find an appropriate vehicle in other dealers' hands once General Motors had advised Iten that it would not perform.

The fourth inquiry is whether General Motors' performance was a "basic assumption"; again, it is reasonable to conclude that General Motors' performance was a basic assumption on which Chevrolet dealers entered into contracts, even if it was "foreseeable" that General Motors would not perform from time to time.

The most difficult question is whether the contingency rendered performance "impracticable." Posner and Rosenfield instruct us to ask whether either party could have prevented General Motors' nonperformance; the answer is no. The final question is which party was in the better position to insure, meaning one must determine which party could more readily estimate the probability of the occurrence, which party could more readily calculate the loss in the event of breach, and which party could "insure," either by itself or in the market, at a lower cost.

Iten was possibly in a better position to estimate the probability of General Motors' failure to perform, although the point is arguable. In any event, it seems clear that the buyer could have better estimated the loss resulting from the contingency.

The insurance analysis is deceptive. The buyer could have insured in the market against nondelivery or could have self-insured by ordering a second truck from another manufacturer, only at great expense. Presumably, it is cheaper for the dealer to self-insure by raising all product prices to cover losses such as the buyer's. There is, however, another form of self-insurance which is cheapest of all, and which the buyer here used: the buyer kept his old truck and used it for the entire building season, although some repairs were needed and although the truck presumably was less productive than a new one would have been.

On balance, then, it seems that the buyer was in a better position to insure, which would mean that the seller should have been discharged. Even if the court did not reach this conclusion on the practicability issue, the above analysis would be considerably clearer and of much greater precedential value than the opinion in the case.

The second case for re-analysis is *Missouri Public Service Company v. Peabody Coal Company*.[117] The seller suffered increases in the cost of coal greatly in excess of what had been projected and what was recaptured in the contract's price escalator provisions. The seller argued that its duty to deliver coal was thus rendered commercially impracticable. The court did not rule on whether the cost increase was so substantial as to render performance impracticable. It did, however, rule that the 1972 Arab oil embargo which caused the increase in all energy prices, including the price of coal, was foreseeable when the contract was entered into in 1967, and for that reason the court denied relief.

Under the hypothetical analysis, the first step would be to inquire whether the parties had allocated the risk of the cost increase caused by the embargo. The court answered affirmatively, implying that the parties' agreement to price escalation provisions evidenced the contractual allocation of all cost and price risks to the seller. This conclusion is overbroad. The fact that courts reach the same conclusion when there

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[117]583 S.W.2d 721 (Mo. Ct. App. 1979), *cert. denied*, 444 U.S. 865 (1979).

is a fixed price, as in *Maple Farms*, or an escalator with a cap, as in *Publicker*, proves that no price provision, standing alone, establishes whether the parties contractually allocated the risk of the massive cost increase prompting the litigation. Accordingly, in the absence of other proof, the more reasonable conclusion, and one wholly consistent with commercial reality, is that the parties either never thought such an increase would occur or chose not to deal with it in the contract.

The second question is whether performance, as agreed, has been affected, which it clearly has. The third question is whether the cost increases were caused by a contingency. Given the broad range and scope of all energy price increases in the period in question, it is fair to conclude that the prices of coal rose for reasons beyond the seller's control.

The fourth question is whether a rise in prices of this magnitude was a contingency the non-occurrence of which was a basic assumption on which the contract was made. The common sense answer in this, and all of the "increased cost" cases, is yes. No party, buyer or seller, enters into a contract on the basic assumption that one side or the other will, at some point during the life of the contract and for a sustained period of time, incur such enormous losses as a consequence of performance.

The most difficult question is whether performance was rendered impracticable. The Posner and Rosenfield analysis is directly on point here as a similar, but not identical, fact pattern forms the basis for one of their hypotheticals.[118]

Assuming that neither party could have prevented the contingency, the analysis turns to the three-pronged "better insurer" question. It seems doubtful that either party at the time of contracting (1967) could have predicted these kinds of increases better than the other, especially because this is the kind of case where the buyer is likely to be as knowledgeable as the seller.

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[118]Posner & Rosenfield, *Impossibility and Related Doctrines In Contract Law: An Economic Analysis*, 6 J. LEGAL STUD. 83, 94 (1977). Posner and Rosenfield's hypothetical is as follows:

> Let C be a large and diversified business concern engaged in both coal mining and the manufacture and sale of large coal-burning furnaces. C executes contracts for the sale of furnaces to D, E, F, etc. in which it also agrees to supply coal to them for a given period of time at a specified price. The price, however, is to vary with and in proportion to changes in the consumer price index.
>
> A few years later the price of coal unexpectedly quadruples and C repudiates the coal-supply agreements arguing that if forced to meet its commitments to supply coal at the price specified in its contracts it will be bankrupted. Each purchaser sues C seeking as damages the difference between the price of obtaining coal over the life of C's commitment and the contract price. C argues that the rise in the price of coal was unforeseeable and ought to operate to discharge it from its obligations.

With regard to the parties' respective abilities to forecast the consequences for contract performance, it is again a draw; the seller can better forecast the consequences to the seller (depending on the excess of its commitments over its resources), and the buyer can better assess losses to the buyer (which are a function of the availability of other coal, other fuels, and changes in demand).

The transaction costs of self-or market insurance for the seller are lower. Posner and Rosenfield suggest that one method, albeit attenuated, of such insurance is for shareholders to diversify their portfolio.[119] While both the buyer's and seller's shareholders can diversify, the seller can self-insure directly by mining reserves or making purchase commitments such that it is covered for the entire amount it owes all buyers. Moreover, it can do this in advance, knowing that it must perform. The buyer may also "hedge" in advance, but the cost of doing so is wasted if the seller performs.

In sum, then, Posner and Rosenfield argue that in this case no discharge should be permitted. This is what the court found, although its analysis is open to the criticisms as previously set forth.[120]

The third case is *Robberson Steel, Inc. v. J.D. Abrams, Inc.*,[121] a 1979 Texas case. There the plaintiff-general contractor sued the defendant-steel supplier for failure to deliver steel to the plaintiff for its building. The defendant pled commercial impracticability because its steel source had been closed by a mill breakdown. In a special verdict, the jury found that the breakdown at the defendant's steel source was a contingency rendering performance impracticable, the non-occurrence of which was a basic assumption on which the contract was made. The court rendered judgment notwithstanding the verdict for the plaintiff, and was upheld on appeal, on the theory that breakdowns were a contingency the parties could have foreseen and should have provided for if relief was intended.

Under the proposed analysis, the first inquiry would be whether the risk of the breakdown had been specifically allocated; no evidence in the opinion suggests that it was. The next question would be whether performance "as agreed" had been affected. Under the new analysis, this inquiry might require further research. It would need to be determined whether the defendant contracted to get steel from a specific source (one affected by the breakdown) or whether the contract was not implicitly or explicitly "source specific" such that if the source contemplated by the defendant failed, the plaintiff could reasonably argue that the defendant was bound to procure the steel from other sources.

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[119] *Id.* at 92, 95.

[120] *See supra* text accompanying notes 85-87.

[121] 582 S.W.2d 558 (Tex. Civ. App. 1979).

The third question is whether the breakdown was a "contingency" beyond the control of the party invoking section 2-615. In a sense, it is always within a party's control to avoid a breakdown, because the party need only provide constant maintenance. That view is extreme, however, and not relevant here as the breakdown affected the defendant's supplier, not the defendant.

The fourth question, whether the non-occurrence of the breakdown was a basic assumption underlying the contract, is easily answered in the affirmative, as the jury found.

Turning to the question of impracticability, the first step required by Posner and Rosenfield is to determine who could better have predicted the breakdown. One would generally choose the party closer to the supplier (here the defendant), although this may be a case where both parties were equally able, or unable, to do so. On the second issue, it seems that the plaintiff could far better have predicted the loss resulting from the contingency than the defendant.

Which party can self-insure or insure in the market at lower cost? No clear answer flows from the contingency itself; it seems unlikely that either party could at reasonable expense have lined up an alternative steel supplier as a form of self-insurance. Similarly, the transaction cost of inflating bids to cover such losses would have been equally expensive to both.

It may well be, however, that the general contractor, unlike the subcontractor, can specify in its contract with the owner that the time for completion will be extended as necessary to account for any delays resulting from equipment failure to the general contractor, subcontractors, or suppliers. Similarly, the general contractor may routinely purchase contractor's all-risk insurance against such losses. In either of these cases, the court should find the subcontractor's duty discharged, as did the jury, but not the court, in *Robberson*.

The fourth case is *Sunflower Electric Cooperative, Inc. v. Tomlinson Oil Co., Inc.*,[122] a 1981 Kansas case. Here the defendant contracted to sell natural gas to the plaintiff from a particular field. When the field failed, the defendant delivered no natural gas. The plaintiff sued for breach, and the defendant argued section 2-615(a). The defendant won at trial, but the decision was reversed on appeal.

While the appellate court agreed that performance was objectively impossible, the court said that "[h]aving concluded that the lack of reserves was foreseeable to [the defendant], we also conclude that [the defendant] assumed the risk that such would be the case."[123] This is a textbook example of the difficulty the foreseeability analysis raises. If the defendant assumes all foreseeable risks, then the defendant assumes

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[122]32 U.C.C. Rep. Serv. (Callaghan) 1462 (Kan. Ct. App. 1981).

[123]*Id.* at 1476.

all risks, because all risks are foreseeable whether or not they are foreseen. If this had been the intent of the drafters of the Code, this result would be fair; in reality, however, this analysis utterly nullifies section 2-615. Presumably, this was not Professor Llewellyn's plan.

The better analysis would start, again, by asking whether one party or the other had assumed the risk that the field would be exhausted. The inquiry would be difficult in this case because there was some evidence in the record to suggest that the field was faltering at the time the contract was made. The better analysis should, however, require greater proof than this to conclude that the seller had assumed the risk.

The second inquiry is whether performance "as agreed" was rendered impracticable; here it clearly was, given that the contract specifically referred to the field in question. The third question is whether or not a "contingency" was involved, which it apparently was; there was no suggestion that the defendant could have done anything to stimulate production from the field. The fourth question is whether failure of the field was a contingency the non-occurrence of which was a basic assumption of the contract. Freed of the confines of discredited "foreseeability" analysis, this question must be answered affirmatively.

On the fifth and last issue of impracticability, the first analytical point is that neither side could have prevented the contingency. To determine the superior insurer, one asks first who could better have determined the probability of the field's failure; the answer here is clearly the seller. Then one must resolve who could better have predicted the resulting loss; as almost always, the answer is the buyer. Finally, in determining who can self or market insure at lower cost, the greater likelihood is the seller, for the reasons discussed in the analysis of *Peabody Coal.* This is as speculative here as in *Peabody*, because neither decision contains the facts on which to base a sound analysis.

The fifth case, *Record Corp. v. Logan Construction Co., Inc.*,[124] a 1982 Pennsylvania decision, is not unlike *Robberson.* A subcontractor failed to deliver iron gates on time to the general contractor because the subcontractor's supplier was on strike. The general contractor sued for breach, and the subcontractor attempted to invoke section 2-615(a). The court held that commercial impracticability was no excuse, stating that a strike qualified under section 2-615(a) only where it was unforeseeable, and that even though the subcontractor had received supplies from this supplier for eleven straight years, we nonetheless live in a "union-conscious society," which means that the strike could have been foreseen and the subcontractor could and should have provided for this risk by contract.[125]

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[124]34 U.C.C. Rep. Serv. (Callaghan) 1579 (Pa. D. & C.3d 1982).

[125]*Id.* at 1584.

Under the proposed analysis, one would first ask whether the parties allocated the risk of this strike; given the past labor history involved, the answer is clearly no. The next question would be whether performance "as agreed" was impracticable. The answer is yes because the contract between the plaintiff and the defendant made specific reference to the supplier in question.

The third question is whether the strike was a "contingency," a question which should be answered affirmatively. The fourth question is whether the non-occurrence of the contingency was a basic assumption of the contract. The answer is also yes; this was not a peripheral matter.

Turning to impracticability, one first notes that the subcontractor could not have prevented the strike. Second, the subcontractor might have been better positioned to predict its probability, although that seems questionable. The general contractor would certainly have been in a better position to predict its effect.

As in *Robberson*, the analysis of who could self or market insure would depend on facts not given in the opinion. If the general contractor would have been the better insurer, discharge would be the correct result.

The final case is *Bende & Sons, Inc. v. Crown Recreation, Inc.*,[126] a 1982 New York case. The defendant contracted to sell boots to the plaintiff. The boots were manufactured in Korea, sent to the United States by ship, and brought from the West Coast to the East Coast by train, where the plaintiff was to purchase them and trans-ship them to its African customer. The boots were destroyed in a train wreck in Nebraska. When the defendant failed to deliver, the plaintiff successfully sued for breach. The defendant's attempt to argue a section 2-615(a) excuse failed because the train wreck was "foreseeable."

Hypothetically, the first inquiry is whether this particular risk was allocated; there is no reason to suggest it was. The second inquiry would be whether performance "as agreed" was rendered impracticable. The answer is clearly yes, inasmuch as the boots in question were not available on the open market, but had instead been specially-manufactured for this contract. Obviously, the train wreck was a contingency, and its non-occurrence was a basic assumption of the contract. The last and difficult question is the one of impracticability. Assuming that neither side could have prevented the contingency, the "superior insurer" question arises. As usual, probably neither side could have better predicted the probability of an accident, although the buyer could presumably have better predicted the resulting loss.

Who can insure at lower cost is not answerable on the facts of the contingency given in the opinion, and the answer might turn ultimately on the form of the buyer's and seller's business enterprises or on their size.

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[126]548 F. Supp. 1018 (E.D.N.Y. 1982).

As these six cases demonstrate, the proposed analysis would have the following effect. First, the analysis is true to the language of the statute. Second, the analysis avoids the debilitating effect of reliance on the concept of foreseeability. Third, the court's inquiry would usually be determinative of which party was better able to insure against the loss. It is difficult to undertake this analysis with these opinions, in part because these points were not considered at the time the cases were argued and there is usually little evidence on point. However, the determination with respect to impracticability would not be inordinately difficult where the parties had been called upon to demonstrate the appropriate facts. Fourth, the resulting analysis would be precedentially useful because all courts would undertake the same analysis and the analysis provides a principled basis for interpreting the statute. Finally, the analysis produces results somewhat more favorable to the seller than has been the case to date. This shift in results is consistent with the intent of section 2-615(a).

VII. Conclusion

The courts have, in effect, emasculated section 2-615(a) of the Uniform Commercial Code. This result is at odds with the drafters' intent, with the language of the statute itself, and often with the language of the comments. What is more, the courts usually make no attempt to arrive at an economically rational solution, which is the appropriate goal of statutory interpretation in these circumstances.

There exists an economically efficient analysis which is true to the language of the statute, the drafters' intent, and the language of the comments. The courts should henceforth use this analysis in determinations of the meaning of section 2-615(a) of the Uniform Commercial Code.

Evolving Concepts of Lawyer Advertising: The Supreme Court's Latest Clarification

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I. Introduction

A commentator on lawyer advertising recently posed the question whether the doctrine issued by the Supreme Court in *Bates v. State Bar of Arizona*[1] had produced progression or confusion.[2] *Bates* held that a total ban on lawyer advertising is unconstitutional and that the first amendment protects truthful newspaper advertising of routine legal services and their prices.[3] Characterizing the issue of attorney advertising as "an obvious problem to members of the legal community,"[4] the commentator noted that the Supreme Court has been "gradually filling in the interstices" created by the *Bates* decision.[5] While the questions surrounding lawyer advertising will probably "never be answered to everyone's total satisfaction,"[6] it has been suggested that the Supreme Court's recent decision in *Zauderer v. Office of Disciplinary Counsel*[7] "should finally define the boundaries within which a state may go in limiting lawyer advertisements' discussions of specific legal problems."[8]

In *Zauderer*, the Court held that a state violates the first amendment by prohibiting lawyer advertising that contains illustrations and advice about specific legal problems.[9] The Court, however, simultaneously held that failure to make full disclosure in the advertisement of all possible costs of a lawsuit can result in disciplinary action.[10] The *Zauderer* decision, though, comes as no surprise in view of the Supreme Court's opinion in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer*

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[1]433 U.S. 350 (1977).

[2]Comment, *Seven Years of the* Bates *Doctrine: Progression or Confusion?*, 7 Am. J. Trial Advocacy 611 (1984) [hereinafter cited as Comment, *Seven Years*].

[3]433 U.S. at 383.

[4]Comment, *Seven Years, supra* note 2, at 620.

[5]*Id.* (citing *In re* Felmeister, 95 N.J. 431, 437, 471 A.2d 775, 778 (1984)).

[6]*Id.* at 621.

[7]105 S. Ct. 2265 (1985).

[8]Comment, *Seven Years, supra* note 2, at 621 n.85 (citing Nat'l L.J., Oct. 15, 1984, at 5, col. 1).

[9]105 S. Ct. at 2280.

[10]*Id.* at 2283 n.15.

Council, Inc.,[11] decided nearly a decade earlier. The *Virginia Pharmacy Board* decision combined issues of commercial speech and regulation of professionals. In its opinion, the Court noted that permissible restrictions on commercial speech include regulation of the time, place, and manner of advertising,[12] prohibitions on advertising which might in any way be false or misleading,[13] and restrictions on advertisements promoting illegal transactions.[14] The *Virginia Pharmacy Board* decision also spawned a line of cases dealing with lawyer advertising. In those cases decided by the Supreme Court, lawyer advertising has consistently been allowed.[15] A sole

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[11]425 U.S. 748 (1976). *Virginia Pharmacy Board* capped a line of cases beginning with Valentine v. Christensen, 316 U.S. 52 (1942), in which the Supreme Court's position had evolved from finding no constitutional restraints on the states' power to regulate "purely commercial advertising" to requiring that first amendment interests be balanced against the public interest served by the regulation in question. *Id.* at 54. *See* Bigelow v. Virginia, 421 U.S. 809, 826 (1975) (state statute making the sale or circulation of any publication which encourages or prompts the processing of an abortion a misdemeanor violates first amendment freedom of speech rights of newspaper editor who published a commercial advertisement announcing availability of placement services of organization in another state where abortion was legal); Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations, 413 U.S. 376 (1973) (municipal ordinance prohibiting discrimination in employment construed as forbidding newspapers to carry "help wanted" advertisements in sex-designated categories does not infringe first amendment rights of advertisers); Breard v. City of Alexandria, 341 U.S. 622 (1951) (municipal ordinance forbidding door-to-door soliciting for sale of goods without prior consent of owners or occupants does not violate freedom of speech and press); Martin v. City of Struthers, 319 U.S. 141 (1943) (municipal ordinance forbidding door-to-door distribution of handbills or circulars advertising a religious meeting invalid as abridging freedom of speech and religion). In another line of cases, first amendment theory has been expanded to encompass protection of an individual's right to know, in addition to his right of expression. *See* First Nat'l Bank v. Bellotti, 435 U.S. 765 (1978) (state statute prohibiting specified business corporations from making contributions or expenditures to influence or affect the vote on any question submitted to the voters violates the first amendment); Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969) (FCC's "fairness doctrine" requiring that public issues be presented to the public by broadcasters and that both sides of issues be given fair coverage does not violate first amendment rights of FCC licensees). *See generally* Baker, *Commercial Speech: A Problem in the Theory of Freedom*, 62 IOWA L. REV. 1 (1976); Cox, *The Supreme Court, 1979 Term-Forward: Freedom of Expression in the Burger Court*, 94 HARV. L. REV. 1 (1980); Emerson, *Legal Foundations of the Right to Know*, 1976 WASH. U.L.Q. 1; Emerson, *Toward A General Theory of the First Amendment*, 72 YALE L.J. 877 (1963); Meiklejohn, *The First Amendment Is an Absolute*, 1961 SUP. CT. REV. 245.

[12]425 U.S. at 771. For a general discussion of content regulation allowable under the first amendment, see Note, *Content Regulation and the Dimensions of Free Expression*, 96 HARV. L. REV. 1854 (1983).

[13]425 U.S. at 771.

[14]*Id.*

[15]*See, e.g.*, Zauderer v. Office of Disciplinary Counsel, 105 S. Ct. 2265 (1985); *In re* R.M.J., 455 U.S. 191 (1982); *In re* Primus, 436 U.S. 412 (1978); Bates v. State Bar of Arizona, 433 U.S. 350 (1977). In spite of this line of cases upholding a lawyer's right to advertise, Chief Justice Burger was quoted in a speech to an American Bar Association commission on July 7, 1985, as stating that "some of the ads are 'sheer shysterism' and

exception occurred in *Ohralik v. Ohio State Bar Association*,[16] which involved instances of blatant "in-person solicitation" rather than a general public advertisement.[17]

Lawyer advertising continues to be litigated with regularity, primarily because of the manner in which the states have chosen to respond to the *Bates* doctrine. Professional responsibility rules regulating advertising have been revised by the states, but only grudgingly and often in the most restrictive manner possible. An American Bar Foundation research attorney pointed out in 1981 that "the very ad in *Bates* would not be permissible in 27 states or under the ABA Model Code."[18] The American Bar Association changed its Model Code of Professional Conduct in 1983 to allow lawyers to include any information in their ads as long as it is not false, fraudulent, or misleading.[19] However, to date, few states have adopted

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that, if he were a private lawyer again, he would 'dig ditches' before resorting to advertising." Kansas City Times, July 8, 1985, at B-8, col. 5. He also opined that "the actions of 'a tiny handful of lawyers advertising in flagrant ways' are 'pulling down' the image of the entire profession," and claimed "I will never — my advice to the public is never, never, never, under any circumstances, engage the services of a lawyer who advertises." *Id.*

[16]436 U.S. 447 (1978).

[17]*Id.* at 448-52.

[18]L. ANDREWS, BIRTH OF A SALESMAN: LAWYER ADVERTISING AND SOLICITATION 43 (1980).

[19]The American Bar Association has changed its Model Code governing attorney advertising twice since 1977. The 1980 amendments permitted and regulated advertising of legal services in the public media. Disciplinary Rule 2-101 expressly prohibited "false, fraudulent, misleading, deceptive, self-laudatory, or unfair" advertising. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 2-101 (1979). Then it went on to create a list of 25 categories of information lawyer ads would be permitted to contain. Generally, the permissible content categories involved personal information about the lawyer and facts relating to the lawyer's qualifications, the areas of law in which the lawyer practiced or specialized, and information concerning the lawyer's fees and arrangements for payment. *Id.*

Given the problems inherent in the application of DR 2-101, the ABA continued its consideration of lawyer advertising issues. This resulted in the publication, in 1981, of a new proposed Model Rule 7.1. Model Rule 7.1 rejected the "laundry list" approach of DR 2-101 on the grounds that information the public might think relevant could not be adequately identified in such a manner. Instead, Model Rule 7.1 took the approach of simply forbidding a lawyer to "make any false or misleading communication about the lawyer or the lawyer's services" and then described what made a statement "false or misleading." MODEL RULES OF PROFESSIONAL CONDUCT Rule 7.1 (1983). Specifically, the rule provides that a communication is false or misleading if it:

> (a) contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading; (b) is likely to create an unjustified expectation about results the lawyer can achieve, or states or implies that the lawyer can achieve results by means that violate the rules of professional conduct or other law; or
> (c) compares the lawyer's services with other lawyers' services, unless the comparison can be factually substantiated.

the ABA 1983 Model Rules.[20]

It is apparent that the *Bates* doctrine has produced both progress and confusion. Although Supreme Court decisions have steadily and gradually been filling in the interstices created by *Bates*, many issues remain unresolved. The states are split on the legality of direct mail advertising. States prohibiting such advertising perceive it as impermissible solicitation,[21] while states upholding attorney direct mailings view it as permissible advertising.[22] Another unresolved issue is the relationship between advertising

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Id. The Model Rules of Professional Conduct were adopted by the ABA in 1983 with Rule 7.1 intact. It is this version that is now under consideration by a number of the states.

[20]The states have, for the most part, used the ABA's proposals only as a reference source for drafting their own response to *Bates*. *See* L. ANDREWS, BIRTH OF A SALESMAN: LAWYER ADVERTISING AND SOLICITATION 135-46 (1980); Braverman, *ISBA and CBA Joint Committee Reviews Illinois Code/ABA Model Rules*, 73 ILL. B.J. 544 (1985); Brosnahan & Andrews, *Regulation of Lawyer Advertising: In the Public Interest*, 46 BROOKLYN L. REV. 423 (1980); ‡ *ABA Rules Drubbed at N.Y. Bar Meeting*, Nat'l L.J., Feb. 11, 1985, at 3, col. 3. As of the end of 1985, only eight states had adopted the ABA Model Rules. *See Fight Intensifies on Ethics Rules*, Nat'l L.J., Dec. 9, 1985, at 3, 8; *Model Rules Jolted*, ABA Journal, Jan. 1986, at 18.

[21]*See, e.g.*, Eaton v. Supreme Court, 270 Ark. 573, 607 S.W.2d 55 (1980), *cert. denied*, 450 U.S. 966 (1981) (advertisement mailed to addressees listing only initial consultation fee and broad areas of law without information on charges for those services not informative in nature but rather impermissible solicitation); Florida Bar v. Schreiber, 407 So. 2d 595 (Fla. 1981) (letter mailed by attorney recommending own employment violates state interest in prohibiting direct mail solicitation motivated solely by personal pecuniary gain); State v. Moses, 231 Kan. 243, 642 P.2d 1004 (1982) (letters mailed by attorney to persons whose names were gathered from the Realtors Multiple Listing constituted recommendation of own employment and was impermissible direct solicitation); Allison v. Louisiana State Bar Ass'n, 362 So. 2d 489 (La. 1978) (letters mailed by attorneys to certain employers which sought formation of contract for prepaid legal services were impermissible direct solicitation); *In re* Green, 78 A.D.2d 131, 433 N.Y.S.2d 853 (1980), *aff'd*, 54 N.Y.2d 118, 429 N.E.2d 390, 444 N.Y.S.2d 883 (1981) (direct mail advertising by attorney to real estate brokers soliciting broker to refer clients to attorney was impermissible third-party mailing); Adler v. Epstein, 482 Pa. 416, 393 A.2d 1175 (1978) (attorneys who phoned and mailed form letters to clients of law firm which formerly employed them in efforts to procure business for own new law firm violated state disciplinary rule against self-recommendation where non-lawyer had not sought advice regarding employment), *cert. denied*, 442 U.S. 907 (1979). *See generally* Thurman, *Direct Mail: Advertising or Solicitation? A Distinction Without a Difference*, 11 STETSON L. REV. 403 (1982); Note, *Attorney Direct Mailings as Impermissible Solicitation or Permissible Advertising*, 9 J. OF THE LEGAL PROF. 211 (1984).

[22]*See, e.g.*, Kentucky Bar Ass'n v. Stuart, 568 S.W.2d 933 (Ky. 1978) (letters mailed to real estate agencies stating only price charged for routine legal services in real estate transactions and no words of solicitation did not constitute prohibited in-person solicitation); *In re* Appert, 315 N.W.2d 204 (Minn. 1981) (disciplinary rule prohibiting distribution of brochure and mailing of informational circular which advertised attorneys' experience and availability in products liability suits against intrauterine device manufacturer are unconstitutional restrictions on first amendment right to free speech); Koffler v. Joint Bar Ass'n, 51 N.Y.2d 140, 412 N.E.2d 927, 432 N.Y.S.2d 872 (1980) (direct mailing of letter to individual real property owners soliciting use of attorney's legal services for the sale of real property was neither misleading nor promoting unlawful activity). *See generally*

specific services and the state's power to regulate specialization within the profession.[23] Finally, the Court noted in *Bates* that "the special problems of advertising on the electronic broadcast media will warrant special con-

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Stoltenberg & Whitman, *Direct Mail Advertising by Lawyers*, 45 U. PITT. L. REV. 381 (1984); Note, *Mail Advertising by Attorneys and the First Amendment*, 46 ALA. L. REV. 250 (1981); Comment, *Attorney Direct Mail Communication: The* Koffler *Commercial Speech Approach*, 4 W. NEW ENG. L. REV. 397 (1982).

> In general, states take one of three approaches to direct mail. One approach is patterned after Rule 7.3 of the American Bar Association's Model Rules of Professional Conduct. It provides that a lawyer may distribute letters generally to persons not known to need legal services of the kind provided by the lawyer but who are so situated that they might find such services useful . . . . Another approach . . . permits mailings to people whom the lawyer has identified as needing specific legal services in a particular manner. . . . The third, most liberal, approach would permit lawyers to send letters to any potential client.

The Barriers to Lawyer Advertising, Nat'l L.J., Dec. 16, 1985, at 14, col. 3-4.

[23]The issue of a state's power to regulate specialization was addressed in *Zauderer*, where the Supreme Court discussed Ohio's prohibition of Zauderer's advertisement containing advice about a specfic legal problem. The Court stated that the "advertisement did not promise readers that lawsuits alleging injuries caused by [the defendant's product] would be successful, nor did it suggest that appellant had any special expertise in handling such lawsuits other than his employment in other such litigation." 105 S. Ct. at 2276. Commenting more generally, the Court noted that

> [a]lthough our decisions have left open the possibility that States may prevent attorneys from making non-verifiable claims regarding the quality of their services, they do not permit a State to prevent an attorney from making accurate statements of fact regarding the nature of his practice merely because it is possible that some readers will infer that he has some expertise in those areas.

Id. at 2276 n.9 (citing Bates v. State Bar of Arizona, 433 U.S. 350 (1977)); *In re* R.M.J., 455 U.S. 191, 203-05 (1982)). The Supreme Court appeared to enhance the deference due state specialization certification procedures when, in January, 1986, it dismissed a challenge to a Texas bar rule that forbids lawyers from advertising for any specific type of case unless they have been certified as specialists in that area. *Advertising Challenge Is Dismissed*, Nat'l L.J., Jan. 27, 1986, at 11, col. 1-2. *See also In re* Mountain Bell Directory Advertising, 185 Mont. 68, 604 P.2d 760 (1979) (state supreme court would not approve telephone company plans to permit lawyers to advertise under 33 different sub-headings of practice). *See also* ABA Model Rule 7.4, which states:

> A lawyer may communicate the fact that the lawyer does or does not practice in particular fields of law. A lawyer shall not state or imply that the lawyer is a specialist except as follows:
>
> (a) a lawyer admitted to engage in patent practice before the United States patent and trademark office may use the designation "patent attorney" or a substantially similar designation;
>
> (b) a lawyer engaged in admiralty practice may use the designation 'admiralty,' 'proctor in admiralty' or a substantially similar designation; and
>
> (c) (provisions on designation of specialization of the particular state).

MODEL RULES OF PROFESSIONAL CONDUCT Rule 7.4 (1983). *See generally* Dickason, *Advertising, Yes! Specialization, When?*, 72 ILL. B.J. 332 (1984); Note, *Seven Years of the* Bates *Doctrine: Progression or Confusion?*, 7 AM. J. TRIAL ADVOC. 611, 614-15 (1984); *Three Challenge Texas Bar's Rule on Ads*, Nat'l L.J., June 3, 1985, at 8, col. 3; *Iowa Justices Delay Decision on Specialization*, Nat'l L.J., Apr. 8, 1985, at 9, col. 1, 38; *Tennessee Lawyers Sue to Overturn Required Ad Disclaimer*, Nat'l L.J., Feb. 11, 1985, at 6, col. 1.

sideration."[24] The state courts' subsequent decisions in broadcast media cases, however, have not been uniform.[25]

This Article analyzes the Supreme Court's opinions on lawyer advertising through *In re R.M.J.*,[26] examines the trends that have been evolving in the states since *In re R.M.J.*,[27] and concludes with a discussion and analysis of *Zauderer*. The authors' goal is to derive from the vast and growing volume of cases spawned by *Bates* those basic principles which serve as the foundation for the resolution of future cases in this area of continuing ferment.

II. From *Bates* to *R.M.J.*

The Supreme Court has issued several decisions regarding lawyer advertising between *Bates v. State Bar of Arizona*,[28] where it invalidated a blanket suppression of lawyer advertising as violative of the first amendment, and *In re R.M.J.*,[29] where the Court considered the rules regarding lawyer advertising Missouri adopted in the wake of *Bates*. In *Bates*, two Arizona attorneys decided to advertise to attract the volume of business necessary to sustain their "legal clinic."[30] They placed an advertisement in a Phoenix newspaper which stated that the clinic provided "legal services at very reasonable fees"[31] and which identified exact prices for several routine legal services.[32] The advertisement also stated that information regarding other types of cases would be furnished on request.[33] Arizona's Disciplinary Rule 2-101(B), incorporated in Rule 29(a) of the Supreme

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[24]*Bates*, 433 U.S. at 384.

[25]In Committee on Professional Ethics and Conduct v. Humphrey, 355 N.W.2d 565 (Iowa 1984), *vacated and remanded,* 105 S. Ct. 2693 (1985), an Iowa court enjoined a law firm from airing three television commercials which featured an actor or actress discussing an injury caused by negligence. The court determined that the advertisements violated various disciplinary rules because they were misleading. *Id.* at 570. The case was remanded to the Supreme Court of Iowa for further consideration in light of Zauderer v. Office of Disciplinary Counsel, 105 S. Ct. 2265 (1985). *See infra* notes 158-65 and accompanying text for a discussion of the *Humphrey* case.

[26]455 U.S. 191 (1982).

[27]*Id.*

[28]433 U.S. 350 (1977).

[29]455 U.S. 191 (1982).

[30]433 U.S. at 354.

[31]*Id.* An illustration of the advertisement is shown at 433 U.S. at 385.

[32]The legal services and prices advertised were:

> Divorce or legal separation — uncontested (both spouses sign papers): $175 plus $20 court filing fee. Preparation of all court papers and instructions on how to do your own simple uncontested divorce: $100. Adoption — uncontested severance proceeding: $225 plus approximately $10 publication cost. Bankruptcy —non-business, no contested proceedings — individual: $250 plus $55 court filing fee; wife and husband: $300 plus $110 court filing fee. Change of Name — $95 plus $20 court filing fee.

Id. at 385.

[33]*Id.*

Court of Arizona, prohibited any lawyer advertising.[34] The attorneys conceded that the advertisement violated the disciplinary rule, but argued that the rule violated their first amendment rights.[35]

The Arizona Bar Association urged six separate grounds for sustaining the regulation: (1) the adverse effect on professionalism, (2) the inherently misleading nature of attorney advertising, (3) the adverse effect on the administration of justice, (4) the undesirable economic effects of advertising, (5) the adverse effect of advertising on the quality of service, and (6) the difficulties of enforcement.[36] The Supreme Court concluded that the public's need for information about the availability and terms of legal services outweighed all of these concerns.[37] Indeed, the Court felt that the advertising prohibition was inconsistent with some of the particular purposes advanced.[38]

The Court, however, exercised great care to limit its holding to the facts of the case. It stated that the constitutional issue was "only whether the State may prevent the publication in a newspaper of appellants' truthful advertisement concerning the availability and terms of routine legal ser-

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[34]Disciplinary Rule 2-101(B) stated in part:

> A lawyer shall not publicize himself, or his partner, or associate, or any other lawyer affiliated with him or his firm, as a lawyer through newspaper or magazine advertisements, radio or television announcements, display advertisements in the city or telephone directories or other means of commercial publicity, nor shall he authorize or permit others to do so in his behalf.

433 U.S. at 355 (citing Arizona statute) (footnote omitted).

[35]433 U.S. at 356. The attorneys also argued that the disciplinary rule violated sections 1 and 2 of the Sherman Act because it limited competition. *Id.*

[36]*Id.* at 368-79.

[37]*Id.* at 379.

[38]In addressing the argument that lawyer advertising is inherently misleading in nature, the Court stated that

> it seems peculiar to deny the consumer, on the ground that the information is incomplete, at least some of the relevant information needed to reach an informed decision. The alternative — the prohibition of advertising — serves only to restrict the information that flows to consumers. . . . Although, of course, the bar retains the power to *correct omissions* that have the effect of presenting an *inaccurate* picture, the preferred remedy is more disclosure, rather than less.

Id. at 374-75 (emphasis added). Regarding the adverse effect on the administration of justice, the Court commented that "[a]lthough advertising might increase the use of the judicial machinery, we cannot accept the notion that it is always better for a person to suffer a wrong silently than to redress it by legal action." *Id.* at 376. The argument that lawyer advertising produces undesirable economic effects was defeated by the Court's statement that "[t]he ban on advertising serves to increase the difficulty of discovering the lowest cost seller of acceptable ability. As a result, to this extent attorneys are isolated from competition, and the incentive to price competitively is reduced." *Id.* at 377. Briefly addressing the adverse effect of lawyer advertising on the quality of legal services, the Court stated that "[r]estraints on advertising . . . are an ineffective way of deterring shoddy work." *Id.* at 378. Finally, on the difficulties of enforcement, the Court noted with irony that "[i]t is at least somewhat incongruous for the opponents of advertising to extol the virtues and altruism of the legal profession at one point, and, at another, to assert that its members will seize the opportunity to mislead and distort." *Id.* at 379.

vices."[39] The Court expressly stated that it was not considering two issues: the peculiar problems associated with advertising claims relating to the quality of legal services and the problems associated with in-person solicitation of clients.[40] Finally, the Court mentioned "some of the clearly permissible limitations on advertising not foreclosed by our holding."[41] These include reasonable time, place, and manner restrictions, suppression of advertising concerning transactions that are themselves illegal, and restraints on false, deceptive, or misleading advertising.[42] Some considerations for applying the false, deceptive, or misleading standard to lawyers' advertising in particular were suggested,[43] but they were so vague as almost to insure that the Court would have to speak to the issues involved with greater particularity in future cases.

After *Bates*, the Court did not take another case involving lawyer advertising until it decided *In re R.M.J.*[44] In the interim, however, the Court decided three cases which have since had a strong impact on the issues involved in lawyer advertising: *In re Primus*,[45] *Ohralik v. Ohio State Bar Association*,[46] and *Central Hudson Gas and Electric Corp. v. Public Service Comm'n of New York*.[47] In the companion cases of *Primus* and *Ohralik*, the Court dealt with commercial speech issues arising from in-person solicitation by lawyers, a topic the Court had expressly avoided in *Bates*. In *Central Hudson*, the Court formulated a four-pronged test to be applied in all challenges to a state's attempt to regulate commercial speech.

In *In re Primus*, the Court held that where the American Civil Liberties Union ("ACLU") engages in litigation as a means for effective political expression and association, the first amendment protects efforts in pur-

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[39]*Id.* at 384. The limited scope of the opinion may lend additional force to the criticism that in its approach to the first amendment in recent years, the Court has "paid little attention to building a systematic body of law, but [has] instead engaged in particularistic and pragmatic balancing." Cox, *supra* note 11, at 26.

[40]433 U.S. at 366 (emphasis added). The Court did give some hint of its attitude toward these issues, however: "[A]dvertising claims as to the quality of services . . . are not susceptible of measurement or verification; accordingly, such claims may be likely to be misleading as to warrant restriction. Similar objections might justify restraints on in-person solicitation." *Id.* at 383-84.

[41]*Id.* at 383. This statement implies the existence of other permissible limitations, but no hint is given of what they might be.

[42]*Id.* at 383-84 (citing *Virginia Pharmacy Board*, 425 U.S. at 771).

[43]The Court stated that "because the public lacks sophistication concerning legal services, misstatements that might be overlooked or deemed unimportant in other advertising may be found quite inappropriate in legal advertising." *Id.* at 383. The Court noted that whether an advertisement is misleading will require consideration of the legal sophistication of its audience and that different degrees of regulation may thus be necessary in different areas. *Id.* at 383 n.37.

[44]455 U.S. 191 (1982).

[45]436 U.S. 412 (1978).

[46]436 U.S. 447 (1978).

[47]447 U.S. 557 (1980).

suit of such litigation.[48] *Primus* dealt with an attorney, Edna Smith Primus, who was associated with the Carolina Community Law Firm and was an officer and cooperating lawyer with a branch of the ACLU. Primus went to a meeting attended by persons who had been sterilized as a condition for continued receipt of medical assistance. In August of 1973, the ACLU decided it would file suit on behalf of any persons sterilized pursuant to this program. Primus, having been informed that Mary Williams was willing to institute suit, wrote Williams on August 30, advising her of the ACLU's offer of free legal representation. Williams subsequently met with the doctor who performed the operation and at that time, having shown the doctor and his attorney Primus' letter, called Primus and announced her intention not to sue. There was no further communication between Williams and Primus.

A complaint was filed against Primus with the Board of Commissioners on Grievances and Discipline of the Supreme Court of South Carolina ("Board"). A panel appointed by the Board found the lawyer guilty of soliciting a client on behalf of the ACLU.[49] Subsequently, the

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[48]436 U.S. at 436-39.

[49]Specifically, Primus was found guilty of violating South Carolina's Disciplinary Rules (DR) 2-103(D)(5)(a) and (c) and 2-104(A)(5). South Carolina's Rule (DR) 2-103(D) provided:

> A lawyer shall not knowingly assist a person or organization that recommends, furnishes, or pays for legal services to promote the use of his services or those of his partners or associates. However, he may cooperate in a dignified manner with the legal service activities of any of the following, provided that his independent professional judgment is exercised in behalf of his client without interference or control by any organization or other person: (l) A legal aid office or public defender office:
>
> (1) A legal aid office or public defender office:
>
> (a) Operated or sponsored by a duly accredited law school.
>
> (b) Operated or sponsored by a bona fide non-profit community organization.
>
> (c) Operated or sponsored by a governmental agency.
>
> (d) Operated, sponsored, or approved by a bar association representative of the general bar of the geographical area in which the association exists.
>
> (2) A military legal assistance office.
>
> (3) A lawyer referral service operated, sponsored, or approved by a bar association representative of the general bar of the geographical area in which the association exists.
>
> (4) A bar association representative of the general bar of the geographical area in which the association exists.
>
> (5) Any other non-profit organization that recommends, furnishes, or pays for legal services to its members or beneficiaries, but only in those instances and to the extent that controlling constitutional interpretation at the time of the rendition of the services requires the allowance of such legal service activities, and only if the following conditions, unless prohibited by such interpretation, are met:
>
> (a) The primary purposes of such organization do not include the rendition of legal services.
>
> (b) The recommending, furnishing, or paying for legal services to its members

Board approved this finding, and its findings were adopted verbatim by the Supreme Court of South Carolina.[50]

Primus argued, based on *NAACP v. Button*[51] and its progeny, that her activities involved constitutionally protected expression and association. In *Button*, the Court had stated that the NAACP's activities which encourage litigation do not constitute solicitation the state can prohibit, but instead are forms of political association and expression fully protected by the first and fourteenth amendments.[52] Without referring to any of its earlier commercial speech cases, the Court found that because the

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is incidental and reasonably related to the primary purposes of such organization.

(c) Such organization does not derive a financial benefit from the rendition of legal services by the lawyer.

(d) The member or beneficiary for whom the legal services are rendered, and not such organization, is recognized as the client of the lawyer in that matter.

436 U.S. 418-19 n.10 (citing DR 2-103(D) incorporated into South Carolina Supreme Court Rule 32 (1976)). South Carolina's DR 2-104(A) provided:

A lawyer who has given unsolicited advice to a layman that he should obtain counsel or take legal action shall not accept employment resulting from that advice, except that:

(1) A lawyer may accept employment by a close friend, relative, former client (if the advice is germane to the former employment), or one whom the lawyer reasonably believes to be a client.

(2) A lawyer may accept employment that results from his participation in activities designed to educate laymen to recognize legal problems, to make intelligent selection of counsel, or to utilize available legal services if such activities are conducted or sponsored by any of the offices or organizations enumerated in DR 2-103(D)(1) through (5), to the extent and under the conditions prescribed therein.

(3) A lawyer who is furnished or paid by any of the offices or organizations enumerated in DR 2-103(D)(1), (2), or (5) may represent a member or beneficiary thereof to the extent and under the conditions prescribed therein.

(4) Without affecting his right to accept employment, a lawyer may speak publicly or write for publication on legal topics so long as he does not emphasize his own professional experience or reputation and does not undertake to give individual advice.

(5) If success in asserting rights or defenses of his client in litigation in the nature of a class action is dependent upon the joinder of others, a lawyer may accept, but shall not seek, employment from those contacted for the purpose of obtaining their joinder.

Id. at 418-19 n.11 (citing DR 2-104(A) incorporated into South Carolina Supreme Court Rule 32 (1976)).

[50]*Id.* at 418-21.

[51]371 U.S. 415 (1963). Subsequent decisions interpreting *Button* have established the principle that "collective activity undertaken to obtain meaningful access to the courts is a fundamental right within the protection of the First Amendment." United Transportation Union v. State Bar of Michigan, 401 U.S. 576, 585 (1971). *See also* Bates v. State Bar of Arizona, 433 U.S. 350, 376 n.32 (1977); United Mine Workers of America v. Illinois State Bar Ass'n, 389 U.S. 217 (1967); Brotherhood of R.R. Trainmen v. Virginia State Bar, 377 U.S. 1 (1964).

[52]371 U.S. at 428-30.

ACLU was similar in relevant respects to the NAACP,[53] any statute prohibiting activity like the ACLU's had to withstand exacting scrutiny in order to be found constitutional.[54] It concluded that Primus had not engaged in in-person solicitation, and that because the case was on a par with *Button*, her activity was protected by the first amendment.[55] Her "speech — as part of associational activity — was expression intended to advance 'beliefs and ideas,' "[56] and, as such, was subject to the full protection of the first amendment rather than the partial protection of the commercial speech doctrine.

In the companion case of *Ohralik v. Ohio State Bar Association*, the Court held that the state bar can constitutionally discipline an attorney for soliciting individuals for pecuniary gain under circumstances likely to pose dangers that the state has an interest in preventing.[57] In *Ohralik*, an experienced lawyer personally solicited the representation of two young auto accident victims in a suit to recover insurance money and was found guilty of in-person solicitation by the Ohio State Bar Association. The Supreme Court first noted that *Bates*[58] did not automatically control the decision because the in-person solicitation involved in the *Ohralik* case differed from the type of communication approved in *Bates*, and because the state's countervailing interest in prohibition was much greater in *Ohralik* than in *Bates*. Specifically, the Court reasoned:

> In this respect, in-person solicitation serves much the same function as the advertisement at issue in *Bates*. But there are significant differences as well. Unlike a public advertisement, which simply provides information and leaves the recipient free to act upon it or not, in-person solicitation may exert pressure and often demands an immediate response, without providing an opportunity

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[53]The Court noted that the ACLU engaged in litigation for the purpose of communicating useful information to the public and expressing their political beliefs. 436 U.S. at 431. The Court rejected the argument that because the ACLU has a policy of requesting an award of counsel fees that this case was outside the protection of the *Button* case. *Id.* at 429.

[54]The Court indicated that South Carolina must demonstrate some compelling reason for its actions. *Id.* at 432 (citing Bates v. Little Rock, 361 U.S. 516, 524 (1960)). The Court found that South Carolina's Disciplinary Rules were so broad as to prevent any lawyer employed by or cooperating with the ACLU from giving unsolicited advice to any lay person who later retained the organization. *Id.* at 433. The Court also noted that an attorney could be punished under these solicitation rules without any proof of some evil flowing from the attorney's actions. *Id.* at 433.

[55]In holding that Primus' letter was clearly protected by the first amendment, the Court seemed to look favorably on such written communications because it stated, "[T]he fact that there was a written communication lessens substantially the difficulty of policing solicitation practices that do offend valid rules of professional conduct. . . . The manner of solicitation in this case certainly was no more likely to cause harmful consequences than the activity considered in *Button* . . . ." *Id.* at 435-36.

[56]*Id.* at 438, n.32 (citing NAACP v. Alabama, 357 U.S. 449, 460 (1958)).

[57]436 U.S. 447, 464-68 (1978).

[58]433 U.S. 350 (1977).

> for comparison or reflection. The aim and effect of in-person solicitation may be to provide a one-sided presentation and to encourage speedy and perhaps uninformed decisionmaking; there is no opportunity for intervention or counter-education by agencies of the Bar, supervisory authorities, or persons close to the solicited individual.[59]

The Court further argued that the state has the responsibility for maintaining the professional standards of lawyers, particularly because lawyers are essential to the administration of justice.[60] The advertising in *Bates* did not erode this important interest of the state, but the type of blatant solicitation involved in *Ohralik* — a kind of "ambulance chasing" — did severely affect the state's interest in preserving professionalism among lawyers.[61] Given the longstanding regulation by the bar of the professional ethics of lawyers, and given the longstanding, judicially recognized rationales for that regulation, the case fits neatly into the Court's belief that commercial speech does not deserve full first amendment protection.[62] Some regulation of commercial speech is constitutionally permissible, and the Court in *Ohralik* found it easy to justify such regulation in light of the state's important interests in protecting consumers and preventing fraud, undue influence, and overreaching.

In a case of major significance to commercial advertising as well as attorney advertising, the Court in *Central Hudson Gas & Electric Corp. v. Public Service Comm'n of New York*[63] set forth a test for determining when the state can regulate commercial speech. The New York Public Service Commission had ordered all electric utilities in New York to stop any advertising that promoted the use of electricity. However, the Commission permitted "informational" advertising designed to encourage shifts of consumption from real demand times to periods of low demand. The regulation was first promulgated during an energy shortage, but the Commission decided to make the regulation permanent in order to promote

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[59]*Ohralik*, 436 U.S. at 457 (footnote omitted).

[60]*Id.* at 460.

[61]The Court summarized the case against the lawyer:

> He approached two young accident victims at a time when they were especially incapable of making informed judgments or of assessing and protecting their own interests. He solicited Carol McClintock in a hospital room where she lay in traction and sought out Wanda Lou Holbert on the day she came home from the hospital, knowing from his prior inquiries that she had just been released . . . . He employed a concealed tape recorder . . . . He emphasized that his fee would come out of the recovery, thereby tempting the young women with what sounded like a cost-free and therefore irresistible offer. He refused to withdraw . . . .

Id. at 467.

[62]*See, e.g.*, Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748 (1976), where the Court noted that permissible restrictions on commercial speech include regulation of the time, place, and manner of advertising. *Id.* at 771.

[63]447 U.S. 557 (1980).

energy conservation. The New York Court of Appeals found the regulation to be constitutional,[64] but the Supreme Court reversed in a comprehensive opinion concerning the doctrine of commercial speech. The Court noted that the Commission's order restricted only commercial speech, which was defined as "expression related solely to the economic interests of the speaker and its audience."[65] The Court determined that the regulation violated the first and fourteenth amendments because it completely banned promotional advertising.[66] Furthermore, commercial speech, the majority argued, should be treated differently from other forms of speech.[67] The Court announced a test to be applied in commercial speech cases:

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[64]Consolidated Edison Co. v. Public Serv., 47 N.Y.2d 94, 390 N.E.2d 749, 417 N.Y.S.2d 30 (1979), *rev'd*, 447 U.S. 557 (1980). The New York court thought that promotional advertising would only exacerbate the energy crisis, and therefore the governmental interest in prohibiting this speech outweighed the constitutional value of the commercial speech. *Id.* at 110, 390 N.E.2d at 758, 417 N.Y.S.2d at 39.

[65]447 U.S. at 561. The Court summarized the commercial speech doctrine and the important cases:

> The First Amendment, as applied to the States through the Fourteenth Amendment, protects commercial speech from unwarranted governmental regulation. Commercial expression not only serves the economic interest of the speaker, but also assists consumers and furthers the societal interest in the fullest possible dissemination of information. In applying the First Amendment to this area, we have rejected the "highly paternalistic" view that government has complete power to suppress or regulate commercial speech. . . . Even when advertising communicates only an incomplete version of the relevant facts, the First Amendment presumes that some accurate information is better than no information at all.

Id. at 561-62 (citing Bates v. State Bar of Arizona, 433 U.S. 350, 374 (1977); Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 761-62 (1976)).

[66]*Id.* at 570.

[67]*Id.* at 561-62. The Court noted that commercial speech receives *less* protection than traditionally protected non-commercial speech. The Court then attempted to summarize *what regulation* of commercial speech was *permissible*:

> The First Amendment's concern for commercial speech is based on the informational function of advertising. Consequently, there can be no constitutional objection to the suppression of commercial messages that do not accurately inform the public about lawful activity. The government may ban forms of communication more likely to deceive the public than to inform it, or commercial speech related to illegal activity . . . .
>
> If the communication is neither misleading nor related to unlawful activity, the government's power is more circumscribed. The State must assert a substantial interest to be achieved by restrictions on commercial speech. Moreover, the regulatory technique must be in proportion to that interest. The limitation on expression must be designed carefully to achieve the State's goal. Compliance with this requirement may be measured by two criteria. First, the restriction must directly advance the state interest involved; the regulation may not be sustained if it provides only ineffective or remote support for the government's purpose. Second, if the governmental interest could be served as well by a more limited restriction on commercial speech, the excessive restrictions cannot survive.

> In commercial speech cases, then, a four-part analysis has developed. At the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest.[68]

This four-part test has since served as the benchmark for determining when the states can regulate commercial speech.[69]

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447 U.S. at 563-64 (cinting Friedman v. Rogers, 440 U.S. 1, 13 (1979); Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 465-66 (1978); First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 783 (1978); Pittsburgh Press Co. v. Human Relations Comm'n, 413 U.S. 376, 388 (1973)) (footnote omitted). *See generally* Jackson & Jefferies, *Commercial Speech: Economic Due Process and the First Amendment*, 65 VA. L. REV. 1, 38-39 (1979).

[68]447 U.S. at 566. The Court's application of its newly articulated four-part test may be summarized as follows. The Commission had not argued that the expression in question was inaccurate or related to an unlawful activity. The New York Court of Appeals, however, had suggested that in light of the noncompetitive market in the utility field, the Commission's order did not restrict commercial speech of any worth. 47 N.Y.2d at 110, 390 N.E.2d at 757, 417 N.Y.S.2d at 39. The Supreme Court rejected this argument. It noted that utilities compete for energy with other users of energy. Furthermore, consumers need to decide how much energy they need to use, and such a regulation decreased the total amount of information available to the public.

The Court observed that "[e]ven in monopoly markets, the suppression of advertising reduces the information available for consumer decisions and thereby defeats the purpose of the First Amendment." 447 U.S. at 567. The Court conceded, however, that the asserted interest of the state in encouraging energy conservation was substantial. Likewise, it conceded that the state's interest in fair rates was also a substantial goal. The ban was deemed to advance those interests. *Id.* at 568-69. The critical question, then, was whether the Commission's order was no more extensive than necessary to advance the state's asserted interests. The Commission completely suppressed speech ordinarily protected by the first amendment. The Court stated that the energy conservation rationale could not justify "suppressing information about electric devices or services that would cause no net increase in total energy use." *Id.* at 570. To the extent the order suppressed speech that in no way impaired the goal of energy conservation, the ban violated the first and fourteenth amendments. Furthermore, the state failed to demonstrate that a more limited restriction on the content of ads would not adequately serve the state's interests. *Id.*

[69]Some commentators, while agreeing with the result in *Central Hudson*, took issue with the four-part test adopted in the case, preferring instead a rule fully protecting both commercial and non-commercial speech:

> The four-part analysis enunciated by the Court in *Central Hudson* and the implicit holding that narrowly drawn content-based regulation of accurate commercial speech would be constitutional are, however, inconsistent with the principles underlying the first amendment. Because commercial expression furthers the same values and interests that require protection of other forms of speech, regulation based on the content of the former should receive full constitutional protection.

The Supreme Court, 1979 Term, 94 HARV. L. REV. 75, 164 (1980). The authors also note, in light of the failure of the Court to define commercial speech, "[T]he application

The decision in *Central Hudson* set the stage for the next Supreme Court decision dealing with attorney advertising. In *In re R.M.J.*,[70] the Court addressed whether Missouri's rules regarding lawyer advertising adopted in the wake of *Bates*[71] violated the first amendment commercial speech doctrine set forth in *Central Hudson*.[72] The court concluded that truthful advertising related to lawful activities is protected by the first amendment, but where the advertising is false, deceptive, or misleading, the state can property regulate it.[73] Even where the communication is not misleading, the state retains some authority to regulate if it can assert a substantial interest and that the interference with speech is in proportion to the interest served.[74]

The Advisory Committee had charged a lawyer (R.M.J.) with four violations of the revised Disciplinary Rule on publicity, DR 2-101.[75] First,

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of a lower level of protection to speech labeled 'commercial' threatens to dilute the protection afforded social and political expression." *Id.* at 167.

Other writers observed that the *Central Hudson* formulation shifts a new burden to the state when it wishes to regulate activity:

> [It] shifts to the government the onerous burden of proving that a restriction on truthful commercial advertising concerning lawful activity both directly advances a substantial interest and was selected only after a meticulous appraisal of narrower alternatives.

Fein, *Free Speech in Ads Wins Key Plug From Brethren*, Nat'l L.J., Nov. 17, 1980, at 15, col. 1.

[70]455 U.S. 191 (1982).

[71]433 U.S. 350 (1977).

[72]447 U.S. 557 (1980).

[73]*In re* R.M.J., 455 U.S. 191, 203 (1982).

[74]*Id.*

[75]The revised Missouri rule stated:

(A) A lawyer shall not, on behalf of himself, his partner, associate or any other lawyer affiliated with him or his firm, use or participate in the use of any form of public communication respecting the quality of legal services or containing a false, fraudulent, misleading, deceptive, self-laudatory or unfair statement or claim.

(B) In order to facilitate the process of informed selection of a lawyer by potential consumers of legal services, a lawyer may publish, subject to DR 2-103, the following information in newspapers, periodicals and the yellow pages of telephone directories distributed in the geographic area or areas in which the lawyer resides or maintains offices or in which a substantial part of the lawyer's clientele resides, provided that the information disclosed by the lawyer in such publication complies with DR 2-101(A), and is presented in a dignified manner:

(1) Name, including name of law firm and names of professional associates; addresses and telephone numbers;

(2) One or more particular areas or fields of law in which the lawyer or law firm practices if authorized by and using designations and definitions authorized for that purpose by the Advisory Committee;

(3) Date and place of birth;

(4) Schools attended, with dates of graduation and degrees;

(5) Foreign language ability;

(6) Office hours;

he had placed an advertisement in a neighborhood newspaper listing areas

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(7) Fee for an initial 30-minute consultation;
(8) Availability upon request of a schedule of fees;
(9) Credit arrangements for payment of fees will be given consideration;
(10) The fixed fee to be charged for the following specific routine legal services:
1. An uncontested dissolution of marriage;
2. An uncontested adoption;
3. An uncontested personal bankruptcy;
4. An uncomplicated change of name;
5. A simple warranty or quitclaim deed;
6. A simple deed of trust;
7. A simple promissory note;
8. An individual Missouri or federal income tax return;
9. A simple power of attorney;
10. A simple will;
11. Such other services as may be approved by The Advisory Committee, the description of which would not be misunderstood or be deceptive, provided that the statement discloses that the quoted fee will be available only to clients whose matters fall into the services described and that the client is entitled without obligation to a specific estimate of the fee likely to be charged in print size at least equivalent to the largest print used in setting forth the fee information.

(C) If a lawyer advertises a fee for a service, the lawyer must render that service for no more than the fee advertised.

(D) Unless otherwise specified in the advertisement, if a lawyer publishes any fee information authorized under DR 2-101(B) in a publication that is published more frequently than one time per month, the lawyer shall be bound by any representation made therein for a period of not less than 30 days after such publication. If a lawyer publishes any fee information authorized under DR 2-101(B) in a publication that is published once a month or less frequently, he shall be bound by any representation made therein until the publication of the succeeding issue. If a lawyer publishes any fee information authorized under DR 2-101(B) in a publication which has no fixed date for publication of a succeeding issue, the lawyer shall be bound by any representation made therein for a reasonable period of time after publication but in no event less than one year.

(E) This rule does not prohibit limited and dignified identification of a lawyer as a lawyer as well as by name:
(1) In political advertisements when his professional status is germane to the political campaign or to a political issue.
(2) In public notices when the name and profession of a lawyer are required or authorized by law or are reasonably pertinent for a purpose other than the attraction of potential clients.
(3) In routine reports and announcements of a bona fide business, civic professional, or political organization in which he serves as a director or officer.
(4) In and on legal documents prepared by him.
(5) In and on legal textbooks, treatises, and other legal publications, and in dignified advertisements thereof.

of practice which had not been approved.[76] Second, he had listed courts where he had been admitted to practice. Third, he had not included a required disclaimer of certification to practice in the listed areas of law. Finally, he had sent professional announcement cards announcing the opening of his office to persons other than lawyers, clients, former clients, personal friends, and relatives in violation of DR 2-102(A)(2).

R.M.J. urged the Missouri Supreme Court to modify its standards in accordance with the four-part test enunciated in *Central Hudson*.[77] The court declined to do so and privately reprimanded him, stating that it "respectfully decline[d] to enter the thicket of attempting to anticipate and to satisfy the *subjective ad hoc* judgments of a majority of the justices of the United States Supreme Court."[78]

The Supreme Court reversed and Justice Powell, speaking for a unanimous Court, indicated the Court's intention to apply the *Central Hudson* commercial speech doctrine to professional advertising cases. The Court commented on the state of the commercial speech doctrine as applied to professionals and advertising:

(F) A lawyer shall not compensate or give anything of value to representatives of the press, radio, television, or other communication medium in anticipation of or in return for professional publicity in a news item.

MO. ANN. STAT. DR 2-101 (Vernon 1982), *reprinted in In re* R.M.J., 609 S.W.2d 411, 412-13 (Mo. 1980), *rev'd,* 455 U.S. 191 (1982).

[76]*In re* R.M.J., 609 S.W.2d at 411. Strangely, the approved areas of law and terminology did not appear in DR 2-101, but in an Advisory Committee's addendum to DR 2-101(B)(2), published only in the January-February 1978 Journal of the Missouri Bar. *Id.* at 415 (Seiler, J., dissenting).

The addendum listed twenty-three areas of law which could be used in advertising. It permitted no deviation from these phrases. It also required the following disclaimer: "Listing of the above areas of practice does not indicate any certification of expertise therein." *Id.*

[77]447 U.S. 557 (1980).

[78]609 S.W.2d at 412 (emphasis in original). Justices Bardgett and Seiler dissented. Justice Bardgett disagreed first with the requirement in the addendum that only certain boilerplate language describing a field of practice be permitted in an advertisement. The charge had been made that R.M.J. had used phrases contrary to those specified in the addendum such as "contracts," and "personal injury" rather than "tort law" and "Workman's Compensation" rather than "Worker's Compensation Law." Responding to these charges, Justice Bardgett urged that the addendum should "be considered as a guide and that no unethical conduct is committed if the terminology used to describe a field of practice is reasonable and fairly describes to a nonlawyer the field of law spoken of in the advertisement." *Id.* at 414 (Bardgett, J., dissenting). He also found that R.M.J.'s statement that he had been admitted to practice in Missouri, Illinois, and before the United States Supreme Court was not unethical. *Id.* He also rejected the contention that mailing such material constituted unethical behavior. *Id.* Justice Bardgett, however, would not have applied *Central Hudson* in its entirety to lawyer advertising because he believed the court "should continue to exercise responsibility to the public in regulating the practice of law and this includes advertising." *Id.*

> Commercial speech doctrine, in the context of advertising for professional services, may be summarized generally as follows: Truthful advertising related to lawful activities is entitled to the protections of the First Amendment. But when the particular content or method of the advertising suggests that it is inherently misleading or when experience has proven that in fact such advertising is subject to abuse, the States may impose appropriate restrictions. Misleading advertising may be prohibited entirely. But the States may not place an absolute prohibition on certain types of potentially misleading information, *e.g.*, a listing of areas of practice, if the information also may be presented in a way that is not deceptive. . . . Although the potential for deception and confusion is particularly strong in the context of advertising professional services, restrictions upon such advertising may be no broader than reasonably necessary to prevent the deception.
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> Even when a communication is not misleading, the State retains some authority to regulate. But the State must assert a substantial interest and the interference with speech must be in proportion to the interest served. . . . Restrictions must be narrowly drawn, and the State lawfully may regulate only to the extent regulation furthers the State's substantial interest.[79]

Justice Seiler also would have dismissed the charges against R.M.J. As to the disclaimer, Justice Seiler would have dismissed the charge because R.M.J. immediately attempted to change his advertisements upon being notified of the rule. *Id.* at 415-16 (Seiler, J., dissenting). Justice Seiler did not believe listing courts where admitted to practice should be permitted in an advertisement, but he did not feel in this case that the listing warranted discipline. *Id.* at 416. "I doubt that informational value gained by the consumer by advertising the isolated fact of admission to the United States Supreme Court justifies the risk of the false impression that such advertising may convey." *Id.* Justice Bardgett, as noted earlier, would have permitted such a listing. *Id.* at 414 (Bardgett, J., dissenting). Justice Seiler also rejected the requirement of using only the phrases in the addendum to describe the areas of practice. In fact, Justice Seiler acknowledged that some of the phrases used by R.M.J. actually might be more helpful to consumers. *Id.* at 416 (Seiler, J., dissenting). Finally, he regarded the mailing of this information as constitutionally permissible in light of *Central Hudson*. Furthermore, Justice Seiler argued that the disciplinary rules in question violated the free speech clause of the Missouri Constitution. *Id.*

[79]455 U.S. at 203. The Court recognized, however, that the *Central Hudson* test must be applied to professional services advertising in light of the special characteristics that advertising has to "mislead and confuse that are not present when standardized products or services are offered to the public." *Id.* at 204 n.15.

The Court recognized that these general principles do not provide "precise guidance," but as they are applied on a case-by-case basis, more guidance will be available. *Id.* at 204 n.16. The language quoted in the text, therefore, should assuage the fears of commentators that the Court's decision in Friedman v. Rogers, 440 U.S. 1 (1979), where it declined to apply a least restrictive means analysis to the state's prohibition of the use of a trade name in connection with an optometric practice, presaged a movement away from this form of analysis. *See generally* Note, *Reuniting Commercial Speech and Due*

However, when the Court finally got to the facts of the case, it found itself unable to apply the principles which allow the state to regulate in the commercial speech area. As to the reprimand for deviating from the precise areas of practice, the State of Missouri was unable to show that any of the advertising forms used by the appellant were misleading or that any substantial state interest was promoted by the regulations:

> Because the listing [of areas of practice] published by the appellant has not been shown to be misleading, and because the Advisory Committee suggests no substantial interest promoted by the restriction, we conclude that this portion of Rule 4 is an invalid restriction upon speech as applied to appellant's advertisement.[80]

The Court also saw no justification for a rule prohibiting the listing of jurisdictions in which a lawyer is licensed to practice,[81] although it was somewhat troubled by the potentially misleading statement that he was a member of the bar of the Supreme Court of the United States. Even so, it decided to permit such information in light of the absence of information in the record that the material was misleading.[82] The third violation was not addressed because the appellant did not raise it. The Court also rejected the mailing of professional announcement cards as a basis for disciplinary action:

> Finally, appellant was charged with mailing cards announcing the opening of his office to persons other than "lawyers, clients, former clients, personal friends and relatives." Mailing and handbills may be more difficult to supervise than newspapers. But again we deal with a silent record. There is no indication that an inability to supervise is the reason the State restricts the potential audience of announcement cards. Nor is it clear that an absolute prohibition is the only solution. For example, by requiring a filing with the Advisory Committee of a copy of all general mailings, the State may be able to exercise reasonable supervision over such mailings. There is no indication in the record of a failed effort to proceed along such a less restrictive path.[83]

Thus, the Court found no evidence that any of R.M.J.'s material

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Process Analysis: The Standard for Deceptiveness in Friedman v. Rogers, 57 TEX. L. REV. 1456, 1473 (1979).

[80] 455 U.S. at 205.

[81] *Id.*

[82] *Id.*

[83] *Id.* (footnotes omitted). To alleviate any fears associated with receiving letters from attorneys, the Court suggested that any envelope received from an attorney containing an advertisement must include the statement "This is an Advertisement." 455 U.S. at 206 n.20.

was misleading.[84] In short, *In re R.M.J.* was an easy case. According to the Court, the State of Missouri had not even tried to justify its regulations. Therefore, the Court could not invoke the state's right to regulate as it apparently wanted to do.

III. Trends in State Court Decisions Since *In re R.M.J.*

A. Misleading Advertising in the Wake of R.M.J.

The Supreme Court in *R.M.J.* allowed for the *total prohibition* of "misleading advertising."[85] At the same time, however, the Court barred states from imposing an "absolute prohibition on certain types of *potentially misleading* information . . . if the information also may be presented in a way that is not deceptive."[86] The Court put some flesh on the bones of this distinction. First, it noted "listing of areas of practice" as an example of the "potentially misleading information."[87] Second, the Court echoed the prong of the fourth *Central Hudson* test by stating that allowable restrictions could be "no broader than reasonably necessary to prevent the deception."[88]

Given the lack of detail in such a standard, it is not surprising that the cases decided by state supreme courts after *R.M.J.* raised the issue whether the ads in question were misleading, either actually or potentially. Thus, in *State ex rel. Oklahoma Bar Association v. Schaffer*,[89] the Oklahoma Supreme Court divided lawyer advertising into three categories: (1) inherently misleading or proven to be misleading in practice, (2) potentially misleading, or (3) not misleading.[90] The court analyzed allowable restrictions in each category as follows:

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[84]The Court stated:

> There is no finding that appellant's speech was misleading. Nor can we say that it was inherently misleading, or that restrictions short of an absolute prohibition would not have sufficed to cure any possible deception. We emphasize, as we have throughout the opinion, that the States retain the authority to regulate advertising that is inherently misleading or that has proven to be misleading in practice. There may be other substantial state interests as well that will support carefully drawn restrictions. But although the States may regulate commercial speech, the First and Fourteenth Amendments require that they do so with care and in a manner no more extensive than reasonably necessary to further substantial interests. The absolute prohibition on appellant's speech, in the absence of a finding that his speech was misleading, does not meet these requirements.

Id. at 206-07.

[85]*See supra* text accompanying note 79. It is important to note that the scope of the prohibition relates to both the "content" and "method" of advertising employed. *Id.*

[86]455 U.S at 203 (emphasis added).

[87]*Id.*

[88]*Id.*

[89]648 P.2d 355 (Okla. 1982).

[90]*Id.* at 358.

> The first category may warrant absolute state prohibition. As to the second, the regulatory device, as suggested in *Bates*, is not necessarily a total ban but rather a required disclaimer or explanation. The restriction on potentially misleading advertising may be no broader than reasonably necessary to prevent specific deception. Regulation of the third category must be justified by a showing of substantial state interest. . . . Unless it is shown that the objectionable ads are either misleading or their restriction furthers some substantial state interest, respondent's exercise of commercial speech cannot be subjected to regulation.[91]

Schaffer concerned a disciplinary proceeding for a lawyer's use of two newspaper advertisements. One offered legal services for adopting a step-child and the other promised free legal services if they were not performed within a certain period of time.[92]

Reviewing the prior proceedings on the ads in question, the court found no contention by the Bar or finding by the trial authority that the ads were misleading. The court noted that the "record fail[ed] to reflect that in practice ads of the type here under consideration may be misleading or that somebody has in fact been harmed by them."[93] The court then looked to see if the state's restriction furthered some substantial state interest. Concluding that the "substantial interest interposed by the state in justification of its restrictive policy — as applied to these ads — rests on the need for protecting an unsophisticated lay public from potential harm from lawyer advertising,[94] the court rejected the claim as "unfounded."[95] Specifically, as to the second ad promising free legal services if not performed within five days, the court concluded that the state surely has no interest in suppressing free legal services or in discouraging expeditious performance by a lawyer.[96]

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[91] *Id.*

[92] *Id.* at 356. The first advertisement stated: "adopt: to love and cherish as your own. Perhaps you already love and cherish your step-child . . . . Even so, he may be certain benefits. A legal adoption may give your step-child many of these benefits while telling your step-child you want him as your very own."

The second advertisement stated: "Need a lawyer? 5 days — or free. Within 5 working days after you provide us with the information we need, we will file the necessary court documents, or if filing is not appropriate, begin providing legal services — or our services are free. Good for 30 days. DIVORCE NAME CHANGE WILLS INCORPORATION ADOPTION."

[93] *Id.* at 358.

[94] *Id.*

[95] *Id.*

[96] *Id.* at 359. The second ad was challenged not on the grounds that it was misleading but rather because it was closely akin to a prohibited guarantee of quality. *Id.* For further discussion regarding the second ad see *infra* text accompanying notes 113-17.

As to the first ad, the Bar had argued that its content did not "impart knowledge designed to foster informed and reliable decision making for counsel selection;" rather,

By contrast, the Utah Supreme Court at about the same time voiced a more expansive concept of the state's interests which might underlie allowable restrictions.[97] In the course of approving a set of proposed new disciplinary rules, the court recognized the state's interest in "protecting the public from false, deceptive, or misleading advertising, . . . and from those aspects of solicitation that involve fraud, undue influence, intimidation, overreaching, and other forms of vexatious conduct."[98] It also indicated that the state has substantial interests in "guarding against advertisements containing common, cheap or undignified claims and in maintaining high standards of dignity and professionalism."[99] It seems fair to characterize the Oklahoma and Utah decisions as representing polar positions adopted by state supreme courts in the wake of *R.M.J.*

Within these conceptual boundaries, the resolution of various cases following *R.M.J.* involved the issues of whether lawyer advertisements regarding fees, claims of expertise in certain areas, or claims of specialization were misleading.[100]

Two cases raised the issue of whether the manner of stating fees in an advertisement had been misleading. In *Kentucky Bar Association v. Gangwish*,[101] a lawyer had authorized or caused the publication of an ad in a chamber of commerce brochure that his law firm "would provide for a period of four months a twenty-percent (20%) discount to members of the Chamber on the cost of legal services."[102] The court read *Bates*

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it appealed "solely to the emotions of the reader." *Id.* The court disagreed and concluded that the ad was a benefit to the public:

> The perils of harm to be dealt by professional advertising must be carefully weighed against the benefits from unimpeded flow of information. Advertising can play a meaningful role in aiding consumers' recognition of a legal problem and in gaining better insight into the economics of the law practice. We find this ad free of any information which could potentially deceive or mislead the public. *Id.* at 359.

[97]*In re* Utah State Bar Petition for Approval of Change in Disciplinary Rules on Advertising, 647 P.2d 991 (Utah 1982).

[98]*Id.* at 993.

[99]*Id.*

[100]Courts also adopted a variety of approaches in addressing advertising issues after *R.M.J.* The Mississippi Supreme Court, in McLellan v. Miss. State Bar Ass'n, 413 So. 2d 705 (Miss. 1982), took a very straightforward approach of simply comparing a challenged telephone book ad with that at issue in *Bates*. The ads were reproduced in appendices to the opinion. *Id.* at 709. Finding that the advertisement in *Bates* was "larger in size and more aggressive" than the one it had under consideration, *id.* at 707, the court permitted it and struck down as constitutionally impermissible rules providing for the complete elimination and blanket prohibition of advertising in the yellow pages of a telephone directory. *Id.* at 708. (See the ads involved in *Bates* and *McLellan* in Appendix A.).

[101]630 S.W.2d 66 (Ky. 1982).

[102]*Id.* The brochure had been distributed to 727 member firms of the Northern Kentucky Chamber of Commerce (of which the respondent's law firm was a member), and there were approximately 1,100 assignee members of the Chamber who would have

and *R.M.J.* to say that "advertising as to fees is limited to fees charged for certain *routine* services and that misleading advertising can be prohibited."[103] Without any further explanation, the court concluded that "advertising '20% discount on legal services' is not advertising of fees for routine legal services and is misleading in every respect."[104] Therefore, the attorney was publicly reprimanded.

The Wisconsin Supreme Court in *In re Disciplinary Proceedings Against Marcus* similarly addressed the issue of whether the ads in question were false, misleading, or deceptive.[105] The defendants had placed several ads in local newspapers claiming that fees charged by many attorneys were higher than necessary due, at least in part, to high overhead, inefficiency, and the practice of charging by the hour. The ads listed fees that the firm charged for particular legal services and stated that, on the average, these fees represented savings of fifty percent. In addition, the firm made it a practice to estimate the cost for any legal matter not covered by a fixed fee, and the firm bore the risk of any underestimate.[106] Characterizing the question of whether fixed fees or time charges better serve the public interest as "a matter about which reasonable minds may differ," the court could not say that the ads in question were "inherently misleading."[107] Thus, the court agreed with the referee's finding that "the ads did not create an overall impression which was false, misleading or deceptive."[108]

Another issue appearing with some frequency immediately following *R.M.J.* was that of self-laudatory advertising and the related matter of claims of special skill or expertise. The Mississippi Supreme Court in

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been entitled to the services. *Id.* The court's finding "that such *widespread dissemination* is in fact advertisement as contemplated in SCR 3.135," *id.* (emphasis added), suggests that a less ambitious effort might have yielded a different result. The court's opinion, however, does not discuss the issue in further detail.

[103] *Id.* at 67 (emphasis in original).

[104] *Id.*

[105] 107 Wis. 2d 560, 320 N.W.2d 806 (1982).

[106] *Id.* at 563, 320 N.W.2d at 808-10. The ads were published both as full page ads and in smaller versions in the Milwaukee Journal and Milwaukee Sentinel from August through October, 1978: *Id.* at 564-67, 320 N.W.2d at 809-10. (See Appendices B & C.).

[107] *Id.* at 577, 320 N.W.2d at 815.

[108] *Id.* *Marcus* also considered the procedural question of who should bear the burden of proof regarding whether an ad is false, misleading, or deceptive. In *Marcus*, the Board of Attorneys Professional Responsibility argued that the attorneys, as officers of the court, should be required to prove the veracity of their statements. *Id.* at 576-77, 320 N.W.2d at 811-12. The Board submitted that if it had the burden of proof, it would be required to produce evidence of non-truth, the inherent difficulty of which would have rendered the disciplinary rules against attorney advertising unenforceable. *Id.* at 569-70, 320 N.W.2d at 811. The court imposed the burden on the Board, relying on the general rule in disciplinary proceedings that the state has the burden of showing a violation. *Id.* at 577, 320 N.W.2d at 811.

McLellan v. Mississippi State Bar Association[109] addressed the issue of whether the ad in question was self-laudatory. Comparing the ad in question[110] with those which the Supreme Court had sustained in *Bates* and *R.M.J.*, the court found the latter "far more susceptible of being self-laudatory" and dismissed the complaint.[111] The court struck at the core of the issue by observing that drawing attention to oneself "is the purpose of all advertisements."[112]

In the *Schaffer*[113] case, the Bar attempted to characterize the lawyer's ad assuring prompt legal service (in the form of a promise that there would be no charge for any legal matter neglected for more than five days) as misleading or potentially deceptive. The supreme court rejected this contention and agreed with the lower court that although the ad was closely akin to a prohibited guarantee of quality, the analogy was "inapposite."[114] The court said that "[a] lawyer's product guarantee might be deemed potentially or presumably deceptive if it is in the nature of a promise whose fulfillment is clearly beyond the sole control of the promisor."[115] The court concluded, however, that the respondent's representations could not be considered excessive "because his pledge of prompt-service-delivery-or-free-performance [was] quite well within his own human means to accomplish."[116] Proceeding to an analysis of a possible state interest that the restriction might promote, the court could find none; to the contrary, the court found the challenged ad's content "compatible with public interest."[117] Thus, the disciplinary proceedings were dismissed.

Related to self-laudatory advertising are ads which make claims as to legal expertise. One of the ads in the *Marcus* case had contained the statement: "[W]hen you come to Marcus and Tepper, the first thing you'll notice is the high level of legal expertise."[118] In an apparent attempt at refutation, the Board challenging the ads had adduced evidence that, "aside from Mr. Tepper, who was an experienced attorney, the members of the firm had very little experience practicing law."[119] The Wisconsin Supreme Court, however, upheld the ad, noting the absence of any proof that clients had either complained about the level of representation they had received or the prices charged, or had received less than a high level of legal expertise in the handling of their legal matters.[120]

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[109]413 So. 2d 705 (Miss. 1982).
[110]*See supra* note 100.
[111]413 So. 2d at 708-09.
[112]*Id.* at 709.
[113]648 P.2d 355 (Okla. 1982). *See supra* text accompanying notes 89-96.
[114]*Id.* at 359.
[115]*Id.*
[116]*Id.*
[117]*Id.*
[118]107 Wis. 2d at 579, 320 N.W.2d at 816.
[119]*Id.* at 578-79, 320 N.W.2d at 816.
[120]*Id.* at 580, 320 N.W.2d at 816. The court also noted in support of its conclusion

Speaking directly to the issue of whether lawyer advertising which contains a statement of an attorney's specialization is misleading, the Minnesota Supreme Court in *In re Johnson*[121] vacated an attorney's admonition for making the statement that he was a Civil Trial Specialist certified by the National Board of Trial Advocacy ("NBTA").[122] The lawyer had been licensed in the state since 1952 and had been primarily engaged in civil trial advocacy.[123] The court characterized the NBTA's certification standards as "rigorous" and "exacting."[124] Following extensive citations to *R.M.J.*, the court observed that "[m]embers of the general public could be misled by claims of specialization when *no guidelines* for specialization have been drawn"; however, the panel hearing the complaint had found the ad neither misleading nor deceptive.[125] Moreover, the court regarded as overly broad under *R.M.J.* standards any blanket prohibition on advertising specialization pending the Minnesota Supreme Court's promulgation of rules describing what specialty designations were acceptable and how to get those designations.[126]

Another approach adopted by some courts with respect to the problem of advertising specializations has been to require that such ads contain a disclaimer of any endorsement by the respective state supreme court concerned.[127] The Arkansas Supreme Court, for example, felt that adver-

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the testimony of a prominent consumer interest attorney that "if properly supervised, recent law school graduates could provide a high level of legal expertise." *Id.* at 579, 320 N.W.2d at 816. This seems to constitute an implicit recognition that the competent performance of many routine legal services does not require years of legal experience.

[121]341 N.W.2d 282 (Minn. 1983).

[122]The ad, placed in a community directory and in telephone book yellow pages, provided in part: "Johnson, Richard W., Civil Trial Specialist Certified by the National Board of Trial Advocacy Personal Injury Wrongful Death." *Id.* at 283. It was challenged under Minnesota DR 2-105, which provided:

> (A) A lawyer shall not use any false, fraudulent, misleading or deceptive statement, claim or designation in describing his or his firm's practice or in indicating its nature or limitations.
>
> (B) A lawyer shall not hold out himself or his firm as a specialist unless and until the Minnesota Supreme Court adopts or authorizes rules or regulations permitting him to do so.

Id. (quoting DR 2-105).

[123]*Id.* at 282.

[124]*Id.* at 283. The NBTA had been formed in 1979; by the spring of 1983, it had certified only 541 lawyers nationwide as trial specialists. Although the state bar association had discussed the question of rules regulating specialization in 1981, it had taken no action pursuant to its discussion. *Id.*

[125]*Id.* at 285 (emphasis added).

[126]*Id.* Where states have a procedure for certifying specialists, however, the Supreme Court appears to have given a green light to rules forbidding lawyers from advertising for any specific type of case unless they have been certified as specialists in that area. *Advertising Challenge Is Dismissed*, Nat'l L.J., Jan. 27, 1986, at 11, col. 1-2.

[127]The Supreme Court in *R.M.J.* had found that the attorney's reference to being "a member of the Bar of the Supreme Court of the United States" could be misleading to the general public unfamiliar with the requirements of admission to its Bar. 455 U.S. at 205. Some state courts have noted the similarity between the lack of guidelines for

tising legal specialties could be misleading if the public believed that a lawyer who advertised as a specialist was in some way endorsed by the court as being competent in that specialty.[128] Thus, it requested the Board of specialization to consider whether the term "Board Recognized Specialist" should contain a disclaimer that the supreme court had not endorsed the lawyers as specialists.[129]

In keeping with this approach, Alabama's disciplinary rules barred publication of any advertisement unless it contained, in legible print, the following disclaimer: "No representation is made about the quality of the legal services to be performed or the expertise of the lawyer performing such services."[130] In *Mezrano v. Alabama State Bar*,[131] the Bar had challenged a lawyer who had advertised routine legal services on several occasions in a newspaper of general circulation without including the disclaimer.[132] The Alabama Supreme Court held that because the state had no rating system or format for identifying attorneys as specialists, the Bar "could reasonably conclude that attorneys should not hold themselves out as being superior to other attorneys."[133] Concluding that "attorneys' representations about the quality of their legal services could very well mislead the public,"[134] the court affirmed a 120-day suspension. Therefore, *Mezrano* is distinguishable from *In re Johnson*, a situation in which the NBTA certification standards were more definite.[135]

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admission to practice before the Supreme Court and the problem of specialization designations. *E.g.*, *In re* Johnson, 341 N.W.2d at 285. The possibility of permissible warning or disclaimer requirements had been suggested in both *Bates*, 433 U.S. at 384, and *R.M.J.*, 455 U.S. at 200 n.11.

[128]*In re* Amendments to the Code of Professional Responsibility and Canons of Judicial Ethics, 637 S.W.2d 589 (Ark. 1982).

[129]637 S.W.2d at 591.

[130]Mezrano v. Alabama State Bar, 434 So. 2d 732, 734 (Ala. 1983) (quoting DR 2-102(A)(7)(f)).

[131]434 So. 2d 732.

[132]*Id.* at 734.

[133]*Id.* at 735. In further support of its conclusion, the court noted that applicants do not receive their bar examination scores if they pass and that "[u]pon passing the bar examination, all attorneys are presumed to be on an equal footing." *Id.* As indistinguishable as newly-admitted lawyers might be from one another, the court did not explain the relationship between these observations and the lawyer in question, who had been licensed for some sixteen years. *Id.* at 733.

[134]*Id.* at 735. The opinion, however, contained no finding that the public had actually been misled. Indeed, it made no reference whatsoever to the language used in the subject ads.

[135]Besides failing to include a required disclaimer, other omissions from lawyer advertising raise similar problems. In *In re* Burgess, 279 S.C. 44, 302 S.E.2d 325 (1983), for example, a lawyer whose ads promised relief from financial difficulty was sanctioned for failing to disclose the nature of the service to be provided as bankruptcy. The disciplinary rule at issue, DR 2-101, provided that an attorney could not use "any public communication which (1) contains a misleading statement, (2) omits a material fact necessary to make the statement not misleading, (3) is intended to attract clients by use of showmanship or garish format, or (4) is presented in an undignified manner." *Id.* at 46, 302 S.E.2d at

B. *Prelude to* Zauderer: *Forms of Advertising*

A state's prohibition of illustrations in lawyer advertising was addressed by the Supreme Court in *Zauderer v. Office of Disciplinary Counsel.*[136] Prior to this most recent pronouncement of the Court on lawyer advertising, several states had addressed the validity of various other forms of advertising, such as the use of trade names, electronic media, and direct mail advertising. In *In re Sekerez*,[137] the Indiana Supreme Court addressed the question whether the prohibition against the use and advertising of trade names was an unconstitutional restraint on commercial speech and thus violative of the first amendment. The court held that it was not.[138]

Sekerez had owned a number of legal clinics, all of which were named for the particular city in which they were located (for instance, "Merrillville Legal Clinic"). These clinics had been advertised in newspapers, telephone directories, and pamphlets. The court noted that in most of the advertising Sekerez had included his name as well as that of the clinic, but his name had always been in much smaller print. The court concluded that the use of a geographic location as part of the name of a law practice constitutes the use of a trade name.[139] Sekerez was consequently charged with improper use and advertisement of a trade name and with advertising his clinics in pamphlets constituting professional notices in violation of Disciplinary Rules 2-101(A) and 2-102(A) and (B).[140]

Sekerez argued that the prohibition against the use of trade names violated the first amendment. The court rejected Sekerez's claim and upheld its disciplinary rules regarding trade names.[141] The court reasoned that the use of a trade name for a legal clinic is inherently misleading because there is often much misunderstanding as to the identity, responsibility, and status of the individuals working in the clinics.[142] This was

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326. The court regarded two ads as violative of the rule. The fact that the lawyer was disbarred, however, probably rested more on his *repeated* neglect of legal matters entrusted to him. *Id.* at 46-47, 302 S.E.2d at 326 (emphasis in original). (See Appendix D.).

In another case a couple of months later, the court ordered only a public reprimand for advertisements which it characterized as "remarkably similar" to the ones disapproved in *Burgess. In re* Hodges, 279 S.C. 128, 303 S.E.2d 89, *cert. denied*, 464 U.S. 960 (1983).

[136]105 S. Ct. 2265 (1985).

[137]458 N.E.2d 229 (Ind.), *cert. denied*, 105 S. Ct. 182 (1984).

[138]*Id.* at 243.

[139]*Id.* at 242.

[140]*Id.* at 241.

[141]*Id.* at 243. In Friedman v. Rogers, 440 U.S. 1 (1979), the Supreme Court similarly upheld a prohibition on the use of trade names by optometrists. The main objection of the Court to the use of trade names by professionals is that "the public may be attracted by a trade name that reflects the reputation of an optometrist no longer associated with the practice. A trade name frees an optometrist from dependence on his personal reputation to attract clients." *Id.* at 13.

[142]The court in *Sekerez*, in reaching its conclusion, noted that the IND. CODE OF PROFESSIONAL RESPONSIBILITY EC 2-11 states: "The use of a trade name or an assumed

true in *Sekerez*, where clients had been unaware that employees of the clinic assisting them were law students or secretaries. With respect to the pamphlets distributed by the clinics, the court objected to the pamphlets' failure to mention the name of a lawyer, thus amounting to advertising under a trade name. The court stated that a lawyer cannot accomplish indirectly what is prohibited directly.[143] Thus, the court proscribed the use of trade names in legal clinics as inherently misleading.

The Supreme Court of Oregon in *In re Magar*[144] addressed an issue related to the use of a trade name when it decided whether a lawyer's advertisement that omitted the lawyer's name was in violation of Disciplinary Rule 2-101(A)(1), which prohibits false and misleading communications, including a material omission of fact. The Disciplinary Review Board had found that Magar, in intentionally failing to place his name on his advertising, had violated DR 2-101(A)(1).[145] The court avoided this issue through an artful interpretation of the disciplinary rule. It held that the Bar must prove that the failure to include the name in any given advertisement is misleading.[146] In this case, it found that evidence of a violation had not been established.[147]

Several recent state court decisions have dealt with the issue of attorney advertising in the electronic media. In *Grievance Committee v. Trantolo*,[148] two attorneys had been charged with violations of the Connecticut Code of Professional Responsibility DR 2-101 when they broadcast four television commercials. The trial court ruled that DR 2-101 does not permit televised advertising by attorneys and thus reprimanded the defendants.[149]

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name could mislead laypersons concerning the identity, reponsibility and status of those practicing thereunder." 458 N.E.2d at 243.

[143] *Id.* at 244.

[144] 296 Or. 799, 681 P.2d 93 (1984).

[145] 296 Or. at 813, 681 P.2d at 100. OR. CODE OF PROFESSIONAL RESPONSIBILITY DR 2-101(A)(1) provides as follows: "A lawyer shall not make any false or misleading communication about the lawyer or the lawyer's services. A communication is false or misleading if it: (1) contains a material misrepresentation of fact or law or omits a fact necessary to make the statement considered as a whole not materially misleading . . . ."

The Disciplinary Review Board in its opinion and the Oregon State Bar, in its brief to the Court, regarded the advertising as misleading because it deprived the reader of the opportunity to check out the lawyer's reputation with friends or relatives before hiring him. 296 Or. at 816, 681 P.2d at 102.

The trouble with this argument is that it ignores the reason for permitting attorney advertising in the first place: people need more information about attorneys. If they are initially familiar with an attorney's reputation or know people who are acquainted with the attorney they certainly will not pay very much attention to an advertisement.

[146] *Id.* at 817, 681 P.2d at 102.

[147] *Id.* at 818, 681 P.2d at 103.

[148] 192 Conn. 15, 470 A.2d 228 (1984).

[149] *Id.* at 20, 470 A.2d at 231. Prior to *Bates*, the Connecticut Code of Professional Responsibility DR 2-101(B) (1972) explicitly prohibited television advertising as well as other forms of advertising. After *Bates*, DR 2-101 was revised as follows:

In overturning the decision of the trial court, the Supreme Court of Connecticut noted that the Connecticut Code does not explicitly prohibit or authorize television advertising by attorneys.[150] Because it did not specifically address this point, the court regarded the rule as ambiguous.[151] It concluded that while the state has a substantial interest in regulating legal advertising, "a blanket restriction on television advertising is not the sort of narrow regulation that the Supreme Court countenanced in *R.M.J.* and *Central Hudson Gas*."[152] Thus, the court permitted attorneys to advertise on television, subject to reasonable regulations.[153]

In *In re Felmeister*,[154] the regulation at issue similarly banned radio and television advertising by lawyers. The defendants Robert A. Felmeister and Hanan M. Isaacs contacted the Supreme Court of New Jersey's Advisory Committee on Professional Ethics and stated that they felt the state's ban on attorney advertising through radio or television was unconstitutionally broad. The Division of Ethics and Professional Services informed the defendants that the matter was presently before New Jersey's Supreme Court Committee on Attorney Advertising and invited the defendants, as interested parties, to testify before the Committee. The defendants, nevertheless, chose not to appear and also allowed their advertisements to be broadcast over radio.

The Division of Ethics and Professional Services then filed charges against them for their willful and deliberate violation of the ban on radio advertising. On review, the court noted that the issue was not the constitutionality of a total ban, but rather whether the court can assure that its rules of conduct are obeyed even when under challenge.[155] The court concluded that even where statutes have been held unconstitutional, enforcement during the challenged period is permissible.[156] The court reasoned

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> (A) A lawyer shall not, on behalf of himself, his partner, associate or any other lawyer affiliated with him or his firm, use, or participate in the use of, any form of public communication containing a false, fraudulent, misleading, deceptive, self-laudatory or unfair statement or claim, nor shall any such communication be in an extravagant format. (B) In order to facilitate the process of informed selection of a lawyer by the public, a lawyer may publish, subject to DR 2-103 and any guidelines adopted by the Superior Court, the following information in *newspapers, periodicals and other printed publications* provided that the information disclosed by the lawyer in such publication complies with DR 2-101(A) and is presented in a dignified manner . . . .

192 Conn. at 18, 470 A.2d at 230 n.3 (emphasis added).

[150] *Id.* at 20, 470 A.2d at 231.

[151] *Id.* at 22, 470 A.2d at 232.

[152] *Id.* at 25, 470 A.2d at 233.

[153] *Id.* at 26, 470 A.2d at 234. The court, however, remanded the case to the trial court to determine if the advertisements in question violated the disciplinary rules in some other way. *Id.* at 26-27, 470 A.2d at 234.

[154] 95 N.J. 431, 471 A.2d 775 (1984).

[155] *Id.* at 442, 471 A.2d at 781.

[156] *Id.* at 444, 471 A.2d at 782.

that the defendants' overbreadth challenge to the rule was not available where commercial, rather than political, speech was at issue.[157]

Of the recent cases that have considered the issue of attorney advertising in the electronic media, perhaps the most consequential is *Committee on Professional Ethics v. Humphrey*.[158] In *Humphrey*, the defendant lawyers Humphrey, Haas, and Gritzner had aired three different advertisements over a Des Moines television station during a three-day period. Each of these advertisements portrayed a dramatic situation emphasizing that persons injured through the negligence of others should consult a lawyer. These dramatizations were followed by a scene depicting the reception area of a law office. Superimposed over this scene were the name, address, phone number, and areas of practice of the defendants' law firm. While this scene was being shown, a voice encouraged persons who felt they had been injured through the negligence of others to call the defendants. The voice also stated that cases would be handled on a percentage basis and that there would be no charge for an initial consultation. The ethics committee subsequently charged the defendants with violations of Iowa's Code of Professional Responsibility DR 2-101. Iowa's DR 2-101 permitted television advertising with several restrictions. The rule provided that only a single, non-dramatic voice, not that of a lawyer, with no other background sound could be communicated on television.[159]

The lawyers contended this rule was unconstitutionally vague and violative of the first amendment.[160] The committee on professional ethics and conduct argued that the defendants' television advertisement could be misleading to the public in two ways: (1) the advertisement could be interpreted as implying it costs nothing to sue,[161] and (2) it included self-

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[157]*Id.* at 446-47, 471 A.2d at 783.

[158]355 N.W.2d 565 (Iowa 1984), *vacated and remanded*, 105 S. Ct. 2693 (1985).

[159]IOWA CODE OF PROFESSIONAL RESPONSIBILITY DR 2-101(B) lists nineteen items that may be mentioned in advertising. It further provides with respect to television advertising:

> The same information, in words and numbers only, articulated by a single nondramatic voice, not that of the lawyer, and with no other background sound, may be communicated on television. In the case of television, no visual display shall be allowed except that allowed in print as articulated by the announcer. All such communications on radio and television, to the extent possible, shall be made only in the geographical area in which the lawyer maintains offices or in which a significant part of the lawyer's clientele resides. Any such information shall be presented in a dignified manner . . . .

355 N.W.2d at 568-69 (quoting IOWA CODE OF PROFESSIONAL RESPONSIBILITY DR 2-101(B)).

[160]The court criticized the lawyers for not availing themselves of the procedure provided in the rules for a reconsideration of the rules, as opposed to rushing out and running the advertisements. "It should be scarcely necessary to point out that any lawyer asserting the wisdom of a rule change, should present the proposal to the committee under the procedure we have provided. The professional disciplinary system would be in utter chaos if violations could be defended on the ground the lawyer involved could think of a better rule." 355 N.W.2d at 569.

[161]The advertisement stated that certain cases were handled on a percentage basis and that there was no other charge for initial consultation. It, however, did not mention

laudatory comments on the advertisers' expertise.[162] The court agreed that these advertisements could mislead the public and therefore issued a writ restraining continued placement of the ads.[163] The court also concluded that Iowa's DR 2-101 was within the area that a state can properly regulate and was not too vague or more expansive than necessary to serve the state's interests.[164] The court reasoned that all the rule prohibited were the tools that would manipulate the viewer's mind and will.[165]

Other state cases have dealt with the issue of whether attorney advertising via direct mail is permissible. In *Spencer v. Honorable Justices of Supreme Court of Pennsylvania*,[166] the plaintiff-attorney sought a declaration that various provisions of the Pennsylvania Code of Professional

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payment of expert witnesses or other costs of litigation. 355 N.W.2d at 570.

[162]In fact, Humphrey had tried six cases, and Haas had virtually no trial experience. *Id.* at 570. The opinion does not state what self-laudatory statement was in question.

[163]The court went on to uphold Iowa's television advertising rule. Justices Larson and McCormick dissented. Larson objected to the "laundry list" of allowable advertising content found in DR 2-101(B), and to the requirements on technique in television advertising. "The combined effect of the rules is to inhibit dissemination of relevant information without a showing of a substantial state interest. This violates the free speech clause of the first amendment." 355 N.W.2d at 572 (Larson, J., dissenting).

Justice Larson noted that the test set forth by the Supreme Court in *Central Hudson* specifies that speech is not protected if it concerns an unlawful activity or is misleading. He observed that the majority objected to the advertising in this case because it *might* be misleading. He noted that this, however, is not the proper test to apply to commercial advertising. *Id.* Furthermore, he felt that these advertisements were not reasonably likely to deceive the public in any event. The Iowa rules do not require the disclosure of costs except when the advertisement mentions a contingent fee rate. *Id.* Here the attorneys merely said the fee would be a percentage. He thought this matter could be resolved at the first conference with the lawyer. *Id.* at 574. He also rejected the conclusion that the advertisements overstated the lawyers' qualifications. *Id.*

Because he viewed the advertisements as concerning a lawful activity and not misleading, Larson reasoned that the advertisements could be restricted only if the state's regulations complied with the balance of the *Central Hudson* test. Larson argued that the restrictions failed in this case because the committee never established a substantial state interest. The Iowa rule restricts the amount of information available to the public. The public would be better off with more information — not less. Larson would have adopted a false and misleading standard in place of Iowa's current version of DR 2-101(B) and its laundry list approach of permissible information that may appear in advertisements. *Id.* at 575-76.

In April, the United States Supreme Court voted 6-3 to dismiss the lawyers' appeal. *Justices Rule on Fees, Advertising*, Nat'l L.J., May 5, 1986, at 27, col. 1. The practical significance of the decision, however, may be limited because only five other states have restrictions at least as severe as Iowa's, and two of them have amendments under consideration to relax their rules. The chairman of the ABA's commission on advertising has expressed doubt that other states would be likely to amend their rules to tighten up on television advertising. *Id.*

[164]355 N.W.2d at 571.

[165]*Id.*

[166]579 F. Supp. 880 (E.D. Pa. 1984).

Responsibility banning all solicitation were unconstitutional.[167] The plaintiff attempted to use direct mail to solicit the business of aircraft owners, pilots, computer users, and others. The defendants contended that direct mailing is permissible to the extent it constitutes advertising, but impermissible to the extent it constitutes solicitation. The court determined that this standard was too vague to be enforceable.[168] In addition, the court held that the absolute ban on direct mail solicitation was unconstitutional in light of the application of the *Central Hudson* test for commercial speech.[169]

The court determined that the regulation failed the first prong of *Central Hudson* which maintains that commercial speech is protected where it is lawful and not misleading.[170] The court determined that the total prohibition on direct mail solicitation inevitably swept within its effect some protected speech.[171] The court also concluded that the second part of the *Central Hudson* test was not met. It requires that where speech is not misleading, the state must assert a substantial interest in regulating the expression.[172] The court rejected all three proferred state interests. As to the state's contention that its regulation protected the public from an invasion of privacy, the court concluded that recipients of direct mail advertising could avoid an affront to their sensitivities by simply throwing the letters away.[173] The court also rejected the state's contention that direct mail solicitation presents evils of undue influence and overreaching because, contrary to in-person solicitation, the recipient of a mailing has time to investigate the lawyer with no pressure to respond.[174] Finally, the court rejected the state's contention that it was protecting the public from conflicts of interest because the state simply failed to prove its contention.[175]

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[167]The Pennsylvania Code of Professional Responsibility provisions at issue were DR 2-103(A) and DR 2-104(A). DR 2-103(A) states: "A lawyer shall not recommend employment, as a private practitioner, of himself, his partner, or associate to a nonlawyer who has not sought his advice regarding employment of a lawyer." DR-2104(A) provides: "A lawyer who has given unsolicited advice to a layman that he should obtain counsel or take legal action shall not accept employment resulting from that advice . . . ." PA. CODE OF PROFESSIONAL RESPONSIBILITY DR 2-103(A); DR 2-104(A) (1974).

[168]579 F. Supp. at 888-89.

[169]*Id.* at 889 (citing *Central Hudson*, 447 U.S. 557, 566 (1980)). Judge Lord noted that direct mail provides the public with useful information. To prohibit such mailings would prevent people from learning about the availability, nature, and price of products and services. *Id.* at 891. Additionally, even if direct mail increased the number of suits, the alternative of more suits would be preferable to letting people suffer in silence. *Id.* (citing Bates v. State Bar of Arizona, 433 U.S. 364, 376 (1977); *In re* Primus, 433 U.S. 412, 436-37 (1978)).

[170]*Id.* (citing *In re* R.M.J., 455 U.S. 191, 205 (1982)).

[171]*Id.*

[172]*Id.*

[173]*Id.* at 890.

[174]*Id.*

[175]*Id.*

In another case dealing with a state's absolute ban on mailed solicitations, the Connecticut Supreme Court similarly held that the regulation was unconstitutional in light of *Central Hudson*.[176] In *Grievance Committee v. Trantolo*, the defendants had sent printed announcements regarding the opening of their law clinic to people with whom they had had no prior professional or personal relationship. They also included a brochure describing their clinic. They were consequently charged with a violation of DR 2-103(C).[177]

The court determined that this blanket prohibition on direct mail solicitation violated the *Central Hudson* test because the state had failed to prove that its prohibition was not more extensive than necessary to serve its interests.[178] The state contended that its regulation was necessary in order to preserve the personal relationship between a lawyer and client and to prevent the evils of solicitation. Specifically, the court determined that there were less intrusive means of satisfying the state's concerns — such as requiring that a copy of the mailing be filed with the grievance committee.[179]

In *In re von Wiegen*,[180] the New York Court of Appeals similarly held that the state's ban on direct mail solicitation was impermissible in that case.[181] The court focused on whether the defendant attorney's mail solicitation of accident victims implicated more substantial state interests than an attorney's solicitation of other clients, thereby justifying a proscription of such mailings. The Committee on Professional Standards had brought a disciplinary proceeding against the defendant attorney based on his direct mail solicitation of the victims injured when the sky-walk collapsed at the Hyatt Regency Hotel in Kansas City, Missouri, in July, 1981.

As with the two prior cases, the court applied the *Central Hudson* test. Because this direct mail solicitation was not related to an unlawful activity, nor was it inherently misleading, the court examined the governmental interests involved in prohibiting such direct mail. The state had contended that it had interests in preventing over-commercialization of the profession, invasion of privacy, the stirring up of litigation, and the potential for deception. The court concluded that these interests were not of sufficient magnitude to override the public's interest in receiving infor-

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[176]Grievance Committee v. Trantolo, 192 Conn. 27, 470 A.2d 235 (1984).

[177]The mail allegedly violated Connecticut Code of Professional Responsibility DR 2-103(C) (1972). 192 Conn. at 30-31, 470 A.2d at 236-37.

[178]192 Conn. at 35, 470 A.2d at 239.

[179]*Id.*

[180]63 N.Y.2d 163, 470 N.E.2d 838, 481 N.Y.S.2d 40, *cert. denied*, 105 S. Ct. 2701 (1985).

[181]*Id.* at 175, 470 N.E.2d at 845, 481 N.Y.S.2d at 47. The court noted, "In sum, the State cannot establish interests of sufficient magnitude to override the public's interest in receiving information on the availability of legal services and the danger of deception presented by the mailing may be controlled by the filing requirement." *Id.*

mation on the availability of legal services.[182] The court also concluded that a complete suppression of direct mail was not justifiable because less drastic alternatives, such as the filing of such letters with the state, could be required.[183] Thus, the charge of direct mail solicitation was dismissed.

In contrast to the above cases, other states have addressed an attorney's use of direct mail advertising by examining whether or not it constituted impermissible solicitation. In *State v. Moses*,[184] a Kansas lawyer had acquired a list of persons in the process of selling their homes and mailed them a letter advertising his services. The attorney was charged with violating Disciplinary Rule 2-103, which prohibits an attorney from recommending himself as a private practitioner to laypersons who have not sought his advice regarding employment. Noting a "distinction between advertising, which may not be prohibited, and direct solicitation, which may," the Kansas Supreme Court said that although the letter was not "of the nature of ambulance chasing and hospital room solicitation," it was nevertheless "directed to a segment of the public which, under present economic conditions, is extremely vulnerable to a suggestion of employment that may or may not be advantageous to the individual homeowner."[185] Without further explanation, the court expressed its opin-

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[182]Specifically, the court noted that over-commercialization is now controlled by the advertising standard in DR 2-101. Furthermore, it did not view the mailings as constituting a substantial invasion of privacy because people could throw the letters away. While the letters might generate suits, the court noted that the victims of this tragedy needed legal counsel. It also conceded that there was a potential for deception — but not as in the case of in-person solicitation. Furthermore, because the court earlier had ruled that such letters must be filed with the state, there would be less likelihood for publication of improper statements. 63 N.Y.2d at 173-75, 470 N.E.2d at 844-45, 481 N.Y.S.2d at 46-47.

[183]*Id.* at 175, 470 N.E.2d at 845, 481 N.Y.S.2d at 47.

[184]231 Kan. 243, 642 P.2d 1004 (1982). Following a personal and individualized salutation, each letter stated:

> As homeowners of today, you are by now well aware of the harsh realities restraining the current real estate market. Inflation, unemployment, and high interest rates all combine to make selling a home a difficult prospect indeed. Selling your home 'By Owner,' will not only save you thousands of dollars, but will increase your chances of selling by offering a lower, but fair, market price. However, many sellers are reluctant to do this — mainly because they feel inexperienced in the legal requirements and technicalities.
>
> As a real estate consultant with 33 years of experience, my $300.00 fee includes all the necessary paperwork, contracts, deeds, and related materials to assist you in selling your home. In addition, you will receive expert advice and any necessary consultations.
>
> If your house is listed, it's easy to terminate the listing contract by simply calling your broker and advising him you want to cancel your listing contract and have him send you the contract marked 'cancelled.'
>
> For additional information, call my office at 273-2392 for an appointment, Monday through Friday.
>
> s/ Earl C. Moses, Jr.
>
> Earl C. Moses, Jr.

Id. at 244-45, 642 P.2d at 1006.

[185]*Id.* at 246, 642 P.2d at 1007. This classification is subject to criticism on two

ion that the regulation and restriction of personal solicitation worked "to the benefit of the general public and to the fair administration of justice" and held that "direct solicitation of a stranger by an attorney for employment for a particular legal matter" violated DR 2-103.[186] Thus, the court proscribed the attorney's use of direct mail as impermissible solicitation.

In *In re Alessi*,[187] the attorneys were similarly charged with a violation of Disciplinary Rule 2-103 prohibiting solicitation when their legal clinic mailed letters, not to homeowners, but to some one hundred realtors in the Albany area quoting fees for listed real estate transactions. The court upheld the finding of professional misconduct and distinguished what types of solicitation are prohibited. The court noted that here the mailings were made to realtors whose interests could be more intertwined with the attorneys' interests than with their clients' interests.[188] The court emphasized that it was *not* imposing a "general ban upon all mailings by attorneys to others than potential clients"; rather, its prohibition was limited to third-party mailings involving a *conflict of interest*.[189] Thus,

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grounds. First, the court seeks to protect persons who would most benefit from additional information. The classification is, in effect, criticizing the defendant for advertising his services in the area of real estate transactions to persons currently selling their homes. Granted, these people are more likely to employ the defendant, but such employment is the purpose of advertising. Furthermore, the services offered in the letter represent a viable option for the recipient. As stated by the Supreme Court in *Bates*, "The bar retains the power to correct omissions that have the effect of presenting an inaccurate picture, [although] the preferred remedy is more disclosure, rather than less." 433 U.S. at 375. The court, in the present case, seems to assume that the recipients of this letter would blindly leap at the opportunity presented merely because the letter is signed by an attorney. Second, by prohibiting advertising to persons "vulnerable to a suggestion of employment," the court has in effect prohibited effective advertising. Such a prohibition, whether achieved directly by express statute or indirectly through similar broad classifications, seems unconstitutionally broad.

[186]231 Kan. at 246, 642 P.2d at 1007. The holding leaves open the question of the extent to which acquaintances or existing clients might permissibly be solicited. *Cf.* Walls v. Miss. State Bar, 437 So. 2d 30 (Miss. 1983) (court declined to discipline two attorneys who had advertised and held an "open house" for their new office, but had not actually solicited clients in any way).

[187]60 N.Y.2d 229, 457 N.E.2d 682, 469 N.Y.S.2d 577 (1983), *cert. denied*, 104 S. Ct. 1599 (1984). Two earlier cases had involved a similar situation. In *In re* Greene, 54 N.Y.2d 118, 429 N.E.2d 390, 444 N.Y.S.2d 883 (1981), the decision was against the lawyer. Kentucky Bar Association v. Stuart, 568 S.W.2d 933 (Ky. 1978), had yielded just the opposite result.

[188]60 N.Y.2d at 234-35, 457 N.E.2d at 686, 469 N.Y.S.2d at 581.

[189]*Id.* at 234, 457 N.E.2d at 685-86, 469 N.Y.S.2d at 581 (emphasis added). The court continued:

> What is proscribed is mailing to that limited number of third persons who themselves may have dealings with potential clients of the attorney from which a conflict of interest may result. Wholly unrelated to the content of the letter [*see generally* Note, *Content Regulation and the Dimensions of Free Expression*, 96 HARV. L. REV. 1854 (1983)], the proscription is not against the attorney making known to potential clients the availability of his services or even against his doing so through third parties, but against his doing so in a particular

the New York court's focus on the conflict of interest issue in *Alessi* clearly distinguished its position from the Kansas court's general opposition to solicitation in *Moses*.[190]

IV. The *Zauderer* Case

The Supreme Court issued its most recent clarification of lawyer advertising in *Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio*.[191] The Court determined whether three forms of Ohio's regulation of lawyer advertising were violative of the first amendment. These regulations included a prohibition on soliciting legal business through advertisements containing advice and information about specific legal problems, restrictions on the use of illustrations, and disclosure requirements regarding contingent fees. The Court held that the first two regulations were violative of first amendment protections under the *Central Hudson* test for commercial speech.[192] The Court held, however, that the state's disclosure requirements regarding contingent fees were reasonably related to the state's interest in preventing consumer deception.[193] The Court also addressed whether Zauderer was denied procedural due process when disciplined in connection with a drunk driving advertisement and concluded that he was not.[194]

There were two advertisements at issue in *Zauderer*. One contained

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manner: through a third party whose interests may be more closely intertwined with those of the attorney than with those of the client.

Id. at 234-35, 457 N.E.2d at 686, 469 N.Y.S.2d at 581.

[190]Indeed, several years earlier the New York Court of Appeals had rejected the "artificial distinction" between advertising and solictation and held that a direct mailing of 7,500 letters by lawyers to individual property owners was constitutionally protected under the first amendment. Koffler v. Joint Bar Association, 51 N.Y.2d 140, 412 N.E.2d 927, 432 N.Y.S.2d 872 (1980), *cert. denied*, 450 U.S. 1026 (1981). It must be remembered, of course, that although truthful direct mail advertising cannot be forbidden, lawyers may be disciplined for mass mailings that are deceptive or not identified as pitches for business. Thus, two California lawyers who had sent 250,000 letters to civil defendants over a 1½ year period advising of the legal options available to debtors were sanctioned where the letters were found to be misleading. *Firm's Mass Mailing Held Deceptive*, Nat'l L.J., Sept. 9, 1985, at 6, col. 1-4.

[191]105 S. Ct. 2265 (1985).

[192]*Id.* at 2280.

[193]*Id.* at 2282. *Cf.* Lyons v. Alabama State Bar, 451 So. 2d 1367 (Ala.), *cert. denied*, 105 S. Ct. 385 (1984). The attorneys had been charged with failing to include a reasonably accurate estimate of court costs in their advertisement which stated: "Video Taped Will . . . $250.00 . . . (Above Fees Do Not Include Court Costs)." 451 So. 2d at 1368. In light of the latter statement and in the absence of a substantial state interest in including a list of specific court costs in the advertisement, the court dismissed the charge. *Id.* at 1372. The court noted, "An inclusion of specific costs would have made the advertisement more informative to some, but that, in and of itself, is not enough to cause the advertisement to be misleading. Anyone reading the advertisement would have been aware that the prices did not include court costs and could have taken steps to determine what those costs were." *Id.*

[194]105 S. Ct. at 2284.

an illustration of the Dalkon Shield intrauterine device and stated that it was not too late to take action against the manufacturer for injuries caused by the device. Additionally, the ad stated that the cases would be handled on a contingent fee basis and that if there was no recovery, no "legal fees [would be] owed by our clients."[195] The other ad offered assistance if a defendant was accused of drunk driving and stated that the "[f]ull legal fee [would be] refunded if [the defendant was] convicted of DRUNK DRIVING."[196]

Zauderer had been prompted to institute the Dalkon Shield advertising campaign as a result of *In re Appert*,[197] a Minnesota Supreme Court decision upholding such an advertisement. The Minnesota Supreme Court had examined brochures and circulars used by Appert and his partner concerning the Dalkon Shield intrauterine contraceptive device. It upheld the right of Appert to engage in such advertising in order to locate women interested in bringing suit for injuries sustained by using the Dalkon Shield.

Zauderer had first (before *Appert*) tried to obtain the consent of the Ohio disciplinary authorities to place the Dalkon Shield advertisement in Ohio newspapers. The Office of Disciplinary Counsel of the Supreme Court of Ohio advised him that such an advertisement would violate Disciplinary Rule 2-101(B), which prohibits the use of illustrations, requires that ads be "dignified," and provides a list of what may be included in the ad.[198] Therefore, Zauderer chose not to run any advertising

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[195] *Id.* at 2269. (See Appendix E.).

[196] *Id.* (See Appendix F.).

[197] 315 N.W.2d 204 (Minn. 1981). *See* Stewart, *A Picture Costs Ten Thousand Words*, 71 A.B.A. J. 62, 63 (1985).

The court in *In re Appert* ruled that the state had failed to demonstrate a compelling justification for prohibiting this type of advertising. In light of the substantial interest of the injured women as well as the interest of the public in finding out this information, the court ruled that the state's interest was "not sufficiently compelling" to justify a restriction of the first amendment rights involved. 315 N.W.2d at 212.

Interestingly, Appert and his partner obtained seventy-five new cases as a result of their advertising campaign, thereby suggesting it was a very effective method of advertising. *Id.* at 206.

[198] Ohio's Code of Professional Responsibility DR 2-101(B) reads as follows:

> In order to facilitate the process of informed selection of a lawyer by potential consumers of legal services, a lawyer may publish or broadcast, subject to DR 2-103, in print media or over radio and television. Print media includes only regularly published newspapers, magazines and other periodicals, classified telephone directories, city, county and suburban directories, law directories and law lists. The information disclosed by the lawyer in such publication or broadcast shall comply with DR 2-101(A) and be presented in a dignified manner without the use of drawings, illustrations, animations, portrayals, dramatizations, slogans, music, lyrics or the use of pictures, except the use of pictures of the advertising lawyer, or the use of a portrayal of the scales of justice. Only the following information may be published or brodcast:
>
> (1) Name, including name of law firm and names of professional associates, addresses and telephone numbers.
>
> (2) One or more fields of law in which the lawyer or law firm is available to practice, but may not include a statement that the practice is limited

at that time. Later, however, after the issuance of the Minnesota Supreme

to or concentrated in one or more fields of law or that the lawyer or law firm specializes in a particular field of law unless authorized under DR 2-105;

(3) Age;
(4) Date of admission to the bar of a state, or federal court or administrative board or agency;
(5) Schools attended, with dates of graduation, degrees and other scholastic distinctions;
(6) Public or quasi-public offices;
(7) Military service;
(8) Published legal authorships;
(9) Holding scientific, technical and professional licenses, and memberships in such associations or societies;
(10) Foreign language ability;
(11) Whether credit cards or other credit arrangements are accepted;
(12) Office and telephone answering service hours;
(13) Fee for an initial consultation;
(14) Availability upon request of a written schedule of fees or an estimate of the fee to be charged for specific services;
(15) Contingent fee rates subject to DR 2-106(C), provided that the statement discloses whether percentages are computed before or after deduction of court costs and expenses;
(16) Hourly rate, provided that the statement discloses that the total fee charged will depend upon the number of hours which must be devoted to the particular matter to be handled for each client and the client is entitled without obligation to an estimate of the fee likely to be charged, in print size at least equivalent to the largest print used in setting forth the fee information;
(17) Fixed fees for specific legal services;
(18) Legal teaching positions, memberships, offices, committee assignments, and section memberships in bar associations;
(19) Memberships and offices in legal fraternities and legal societies;
(20) In law directories and law lists only, names and addresses of references, and, with their written consent, names of clients regularly represented.

Ohio Code of Professional Responsibility DR 2-101(B) (1982).

This so called "laundry list" of permissible advertising is similar to the rules considered by the Supreme Court in *In re* R.M.J. *See supra* note 75. Ohio's version of DR 2-101(B) differs very little from the A.B.A. Model Code of Professional Responsibility. *See infra* text accompanying notes 286-301.

Counsel for the Office of Disciplinary Counsel argued to the Supreme Court that a "laundry list" approach as utilized in Ohio's DR 2-101(B) is the only practical way to police lawyer advertising. A precisely worded rule enables attorneys who see professional advertising to recognize advertising in violation of the rule and thus be in a position to report violations to the Office of Disciplinary Counsel. Consequently, the rules in question are rationally related to the state's compelling interest in preventing misleading advertising by lawyers. *See Court to Deal Again with Lawyer Advertising*, Nat'l L.J., October 15, 1984, at 5, col. 1.

One, however, can certainly question the need for practicing attorneys to report advertising violations to the Office of Disciplinary Counsel. The test enunciated in *In re* R.M.J. specifically stated, "[R]estrictions upon such advertising may be no broader than reasonably necessary to prevent the deception." 455 U.S. at 203-04. A less restrictive alternative is available in the case of *all* advertising. As the *R.M.J.* Court noted with

Court's decision in *In re Appert*[199] and the Supreme Court's favorable lawyer advertising decision in *In re R.M.J.*,[200] Zauderer again met with the staff of the Office of Disciplinary Counsel to discuss his proposed advertisement. The parties agreed that the Dalkon Shield advertisement failed to conform to DR 2-101 and that certain aspects of this rule were not touched upon in the *R.M.J.* case. Although the Disciplinary Counsel took no position as to whether the advertisement in question should be published, Zauderer, relying upon the Supreme Court's decision in *R.M.J.* and his belief that Ohio's regulations were unconstitutional,[201] chose to run the advertisement[202] in three dozen Ohio newspapers.[203] He received 234 inquiries and filed ninety-five lawsuits.[204]

After placing the advertisement dealing with drunk driving in *The Columbus Citizen-Journal*,[205] Zauderer received a call from the Office of

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respect to *mailed* advertising, a state may police it "by requiring a filing with the Advisory Committee of a copy of all general mailings, [thus] the State may be able to exercise reasonable supervision over such mailings." *Id.* at 206.

Obviously, the same is true of *all* advertising. The state could require that attorneys file all advertising in a central location. Persons familiar with the state rules with respect to advertising could then review it for compliance with those rules. Thus, there would be no need for members of the practicing bar to be able to spot every advertisement that fails to conform to the rules.

[199]315 N.W.2d 204 (Minn. 1981).

[200]455 U.S. 191 (1982).

[201]105 S. Ct. at 2274. *See also* Stewart, *supra* note 197, at 63.

[202]*In re* Complaint against Philip Q. Zauderer v. Office of Disciplinary Counsel, Findings of Fact and Recommendation of the Board of Commissioners on Grievances and Discipline of the Supreme Court of Ohio, No. 454 at Exhibit B, Office of Disciplinary Counsel v. Zauderer, 10 Ohio St. 3d 44, 461 N.E.2d 883 (1984), *aff'd in part, rev'd in part*, 105 S. Ct. 2265 (1985) [hereinafter cited as Complaint against Zauderer].

[203]The newspapers had a combined circulation of 1,860,160. This advertisement appeared on those days on which it was most likely to reach the greatest number of women readers. Stewart, *supra* note 197, at 63-64.

[204]Zauderer still has 70 of his cases pending. Stewart, *supra* note 197, at 64. Thus far, he has received more than two million dollars through settlements — all on a contingent fee basis. *Id.* This suggests that placing the advertisements in question has already turned out to be richly rewarding.

In fact, there is a certain advantage to engaging in activities other persons regard as unethical or even illegal. In this case, the advantage is that other people are not going to advertise. One might ask whether placing advertisements such as the one discussed in this case really makes economic sense. As the Supreme Court gradually lowers the inhibitions of other lawyers, more attorneys will advertise. The likely effect of this will be that advertising as a whole will be far less effective — or perhaps not effective at all. It is the *failure of others to advertise*, in the authors' opinion, that results in such advertising being so successful.

[205]Complaint against Zauderer, *supra* note 202, at Exhibit A.

Zauderer's thinking with respect to advertising makes a great deal of sense. He chose not to place a general advertisement, but rather specifically advertised for clients likely to have a particular legal need — namely women injured by the Dalkon Shield and people who had been arrested (or who might be arrested) for driving while intoxicated. Obviously,

Disciplinary Counsel advising him that the advertisement constituted an offer to accept a criminal case on a contingent fee in violation of DR 2-106(C).[206] Zauderer immediately stopped the advertisement. Although he received two inquiries in response to the advertisement, Zauderer declined to represent these callers. In a letter to the Disciplinary Counsel he admitted the advertisement violated the prohibition against contingent fees in criminal cases. His letter indicated that he had merely forgotten about this rule.[207]

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these people have a specific need for legal services while the average person really never needs the services of an attorney. It certainly makes the most sense to try to identify people who actually need the services of an attorney because these people are the most likely to see and respond to the advertisement in question.

Many other attorneys have tried the same strategy of placing advertisements aimed at people with a need for specific legal services. *See, e.g.*, Kentucky Bar Association v. Stuart, 568 S.W.2d 933 (Ky. 1978) (attorneys mailed letters to real estate agencies concerning their willingness to engage in real estate law); Woll v. Kelley, 409 Mich. 500, 297 N.W.2d 578 (1980) (attorneys sent letters to retired union members concerning workmen's compensation claims); Koffler v. Joint Bar Ass'n, 51 N.Y.2d 140, 412 N.E.2d 927, 432 N.Y.S.2d 872 (1980) (attorneys sent letters to real estate owners notifying them of their willingness to perform services with respect to the sale of real property and to real estate brokers asking them to refer clients to the lawyers); *In re* Greene, 78 A.D.2d 131, 433 N.Y.S.2d 853 (1980), *aff'd*, 54 N.Y.2d 839, 429 N.E.2d 390, 444 N.Y.S.2d 58 (1981) (lawyer mailed flyers to real estate brokers requesting them to refer individuals to him for legal services in the sale or purchase of real property); Dayton Bar Ass'n v. Herzog, 436 N.E.2d 1037 (Ohio 1982) (lawyer mailed letters to defendants in municipal court cases which were listed in the Daily Court Reporter).

[206]The Ohio Code of Professional Responsbility DR 2-106 reads as follows:

(A) A lawyer shall not enter into an agreement for, charge, or collect an illegal or clearly excessive fee.

(B) A fee is clearly excessive when, after a review of the facts, a lawyer of ordinary prudence would be left with a definite and firm conviction that the fee is in excess of a reasonable fee. Factors to be considered as guides in determining the reasonableness of a fee include the following:

(1) The time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly.
(2) The likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer.
(3) The fee customarily charged in the locality for similar legal services.
(4) The amount involved and the results obtained.
(5) The time limitations imposed by the client or by the circumstances.
(6) The nature and length of the professional relationship with the client.
(7) The experience, reputation, and ability of the lawyer or lawyers performing the services.
(8) Whether the fee is fixed or contingent.

(C) A lawyer shall not enter into an arrangement for, charge, or collect a contingent fee for representing a defendant in a criminal case.

OHIO CODE OF PROFESSIONAL RESPONSIBILITY DR 2-106 (1982).

[207]Stewart, *supra* note 197, at 64. The objectionable wording in this advertisement apparently was the phrase, "[f]ull legal fee refunded if convicted of DRUNK DRIVING." This arguably amounts to an offer to take a criminal case on a contingent fee basis.

The Office of Disciplinary Counsel then filed a complaint against Zauderer alleging he had violated the Disciplinary Rules of the Ohio Code of Professional Responsibility by placing the Dalkon Shield and drunken driving advertisements.[208] There were a number of charges against Zauderer concerning the Dalkon Shield advertisement. He was charged with violating the prohibition against the use of illustrations in advertisements,[209] failing to advertise in a dignified manner,[210] and violating his oath of office.[211] In an amended complaint, the state added two new counts. It asserted that Zauderer had not properly disclosed in the advertisement whether contingent fee percentages would be computed before or after the deduction of court costs and expenses.[212] Finally, the state charged that by placing these advertisements he had violated the rule that prohibits an attorney from recommending employment of himself to one who has not sought his advice regarding the employment of a lawyer[213] and the rule that prohibits an attorney from accepting employment after giving unsolicited advice to an individual that he obtain counsel or take legal action.[214] The complaint also charged that Zauderer's drunk driving advertisement violated the prohibition against handling criminal cases on a con-

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[208]Interestingly, the Office of Disciplinary Counsel did not base its decision to proceed in this matter on complaints instituted by persons who had contacted Zauderer as a result of his advertisement. It did receive complaints, however, from the local counsel for A.H. Robins Co., the manufacturer of the Dalkon Shield, and from other lawyers. Stewart, *supra* note 197, at 64.

[209]Complaint aganst Zauderer, *supra* note 202, at 2, Count VI. It should be noted that neither the Board nor the Ohio Supreme Court found a violation based on this charge.

[210]*Id.* at 2, Count V.

[211]*Id.* at 2, Count VII.

[212]*Id.* at 3, Count VIII. This allegedly violated DR 2-101(B)(15) of the Ohio Code of Professional Responsibility: "Only the following information may be published or broadcast . . . (15) [c]ontingent fee rates subject to DR 2-106(C), provided that the statement discloses whether percentages are computed before or after deduction of court costs and expenses." This also was alleged to violate DR 2-101(A) based on the theory that leaving this information out was deceptive.

[213]Complaint against Zauderer, *supra* note 202, at 3, Count IX. DR 2-103(A) of the Ohio Code of Professional Responsibility reads: "A lawyer shall not recommend employment, as a private practitioner, of himself, his partner, or associate to a non-lawyer who has not sought his advice regarding employment of a lawyer."
OHIO CODE OF PROFESSIONAL RESPONSIBILITY DR 2-103(A) (1982).

Zauderer violated this provision because the advertisement by implication recommended his own employment: "Our law firm is presently representing women on such cases . . . ." *See supra* note 202.

[214]Complaint against Zauderer, *supra* note 202, at 3, Count IX. DR 2-104(A) of the Ohio Code of Professional Responsibility states:

> (A) A lawyer who has given unsolicited advice to a layman that he should obtain counsel or take legal action shall not accept employment resulting from that advice, except that:

tingent fee basis.[215] Subsequently, a hearing was held before a three-member panel of the Board of Commissioners on Grievances and Discipline of the Ohio Supreme Court. Zauderer contended that Ohio's regulations regarding the content of attorney advertising were unconstitutional as applied to him. The panel rejected these contentions, noting that neither *Bates*[216] nor *In re R.M.J.*[217] had forbidden all regulation of lawyer advertising.[218] In addition, the panel found that the state's interests in prohibiting advertising which solicited clients to pursue a particular legal claim were as substantial as the state's interests in prohibiting in-person solicita-

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(1) A lawyer may accept employment by a close friend, relative, former client (if the advice is germane to the former employment), or one whom the lawyer reasonably believes to be a client.
(2) A lawyer may accept employment that results from his participation in activities designed to educate laymen to recognize legal problems, to make intelligent selection of counsel, or to utilize available legal services if such activities are conducted or sponsored by any of the offices or organizations enumerated in DR 3-103(D)(1) through (5), to the extent and under the conditions prescribed therein.
(3) A lawyer who is recommended, furnished or paid by a qualified legal assistance organization enumerated in DR 2-103(D)(1) through (4) may represent a member or beneficiary thereof, to the extent and under the conditions prescribed therein.
(4) Without affecting his right to accept employment, a lawyer may speak publicly or write for publication on legal topics so long as he does not emphasize his own professional experience or reputation and does not undertake to give individual advice.
(5) If success in asserting rights or defenses of his client in ligitation in the nature of a class action is dependent upon the joinder of others, a lawyer may accept, but shall not seek, employment from those contacted for the purpose of obtaining their joinder.

Ohio Code of Professional Responsibility DR 2-104 (1982).

This charge is presumably based upon the statement in the advertisement that the reader should not "assume it is too late to take legal action against the Shield's manufacturer." *See supra* note 202.

[215]Complaint against Zauderer, *supra* note 202, at 2, Counts II and III. It was alleged that he had violated DR 2-l0l(B)(l5) and DR 2-101(A) of the Ohio Code of Professional Responsibility.

Only the following information may be published or broadcast . . .
(15) Contingent fee rates subject to DR 2-106(C), provided that the statement discloses whether percentages are computed before or after deduction of court costs and expenses.

DR 2-101(A) states:

(A) A lawyer shall not, on behalf of himself, his partner, associate or any other lawyer affiliated with him or his firm, use, or participate in the use of, any form of ublic communication containing a false, fraudulent, misleading, deceptive, self-laudatory or unfair statement or claim.

Ohio Code of Professional Responsibility DR 2-101(B)(15); DR 2-101(A) (1982).

[216]433 U.S. 350 (1977).

[217]455 U.S. 191 (1982).

[218]*Zauderer*, 105 S. Ct. at 2274.

tion as expressed in *Ohralik*.[219] Specifically, the panel concluded that as to the Dalkon Shield advertisement, Zauderer breached Ohio's prohibition against the use of illustrations, deceptive advertising, self-recommendation, and accepting employment resulting from unsolicited advice.[220] The panel concluded that the ad was deceptive and misleading because it failed to disclose a client's potential liability for costs even if her suit was unsuccessful.[221] As to the drunken driving advertisement, the panel concluded that it was deceptive.[222] The panel found it deceptive because the ad stated "[f]ull legal fee refunded if convicted of DRUNK DRIVING," and a person who pleads guilty to a lesser charge may not be convicted, but his legal fee would not be refunded.[223] Thus, the ad was misleading, and the panel consequently recommended that Zauderer be publicly reprimanded.

The Board of Commissioners on Grievances and Discipline of the Supreme Court of Ohio reviewed the decision of the three-member panel of the Board. The Board adopted the panel's findings in full, but recommended that the sanction of a public reprimand be increased to indefinite suspension from the practice of law.[224]

The decision of the Board was then reviewed by the Supreme Court of Ohio.[225] It affirmed the findings of the panel and the Board,[226] but reduced the penalty to a public reprimand.[227] The court observed that the Supreme Court has recognized the power of the states to regulate attorney advertising.[228] The court then ruled that its Disciplinary Rules

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[219]*Id.* (citing *Ohralik*, 436 U.S. 447 (1978)).

[220]*Id.* at 2273.

[221]*Id.*

[222]*Id.*

[223]*Id.*

[224]*Id.* at 2274.

[225]Office of Disciplinary Counsel v. Zauderer, 10 Ohio St. 3d 44, 461 N.E.2d 883 (1984).

[226]The Ohio Supreme Court ruled:

> As to the Dalkon Shield advertisement we agree with the findings of the panel and board that respondent violated DR 2-101(B), prohibiting illustrations in an advertisement; DR 2-104(A), in accepting employment resulting from unsolicited advice given by him to a non-lawyer; DR 2-101(A), in publishing communications which were misleading; DR 2-101(B)(15), by failing fully to disclose the terms of the contingent fee arrangement which was intended to be entered into at the time of publishing the advertisement; and DR 2-103(A), in recommending employment of himself as a private practitioner to a non-lawyer who had not sought his advice regarding employment of a lawyer.

10 Ohio St. 3d at 47, 461 N.E.2d at 886.

These sections which the Panel and Board found had been violated by the respondent are constitutional provisions of the Ohio Disciplinary Rules as contained within the Code of Professional Responsibility.

[227]10 Ohio St. 3d at 48-49, 461 N.E.2d at 887.

[228]See *In re* R.M.J., 455 U.S. 191, 203 (1982), in which the United States Supreme Court indicated that the states retain some authority to regulate advertising although it

regarding lawyer advertising complied with those set forth by the Supreme Court.[229] Specifically, the court noted that the state's disclosure requirements concerning ads that mention contingent fees are permissible.[230] The court reasoned that for purposes of clarity, people reading an advertisement that mentions a contingent fee need to know what the fees are as well as any additional costs that might be assessed against them.[231] The court also thought it reasonable for the state to restrict lawyers from accepting employment resulting from unsolicited advice.[232] The court also agreed with the panel's conclusion and reasoning that the drunken driving advertisement was misleading.[233]

On appeal, the United States Supreme Court, in an opinion by Justice White, affirmed the decision of the Ohio Supreme Court in part and reversed it in part.[234] The Court noted that its approach to commercial speech is well settled.[235] According to the *Central Hudson* test, where com-

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is speech protected to some extent by the first amendment of the United States Constitution, and Bates v. State Bar of Arizona, 433 U.S. 350, 383-84 (1977).

[229]10 Ohio St. 3d at 48, 461 N.E.2d at 886.

[230]*Id.*

[231]*Id.* Zauderer never stated the exact percentage charged in contingent fee cases, nor did he state in his drunk driving advertisement that the client would be responsible to pay certain costs of litigation.

The failure to mention the costs does seem somewhat misleading as persons reading the advertisement might falsely conclude it would cost them nothing to litigate a suit. On the other hand, this matter could be explained by an attorney to prospective clients at the first interview. If a person did not wish to proceed after learning this information, he would be free to drop the matter.

[232]10 Ohio St. 3d at 48, 461 N.E.2d at 886-87. The Ohio Supreme Court did not specify any reasons why it thought an attorney should be prohibited from accepting such employment. If this rule were to be upheld with respect to lawyer advertisements, it would in effect prohibit the use of any advertisements by attorneys. The Ohio Supreme Court is attempting through this rule to enforce a *total ban* on attorney advertising because all advertisements are intended to promote the services of the advertiser and to result eventually in the employment of the advertiser. No one would waste money advertising if he did not expect to generate eventually some additional business as a result of the advertisement. Because this in effect amounts to a total ban on advertising, it clearly cannot be reconciled with the United States Supreme Court's prior decisions in this area.

One might also argue that the advertisement did not recommend Zauderer's employment in any event. *See supra* notes 202 and 205. The drunk driving advertisement does not recommend his employment in any way. The Dalkon Shield advertisement merely states: "Our law firm is presently representing women on such cases . . . . For free information call 1-614-444-1113." One could argue that he was merely stating facts, not recommending that readers employ him.

[233]10 Ohio St. 3d at 48, 461 N.E.2d at 887.

[234]Zauderer v. Office of Disciplinary Counsel, 105 S. Ct. 2265 (1985). Justice Powell took no part in the consideration or decision of the case.

[235]The Court stated:

> The States and the Federal Government are free to prevent the dissemination of commercial speech that is false, deceptive, or misleading, or that proposes an illegal transaction. Commercial speech that is not false or deceptive, and

mercial speech is neither false nor deceptive, the state must prove that its restrictions directly advance a substantial government interest.[236] The Court divided its analysis of Ohio's advertising regulations into three parts: prohibition of advertisements that contain legal advice on specific legal problems, prohibitions on the use of illustrations, and the obligation of advertising attorneys to disclose the terms of contingent fees in their advertising. The Court held that an attorney may not be disciplined for soliciting business through advertisements which contain legal advice on specific legal problems,[237] or for using accurate, nondeceptive illustrations.[238] The Court held, however, that the state's requirement that ads which refer to contingent-fee arrangements contain information regarding a client's liability for costs was reasonable.[239]

With respect to Ohio's rules prohibiting self-recommendation and prohibiting the acceptance of employment resulting from unsolicited legal advice, the Court ruled for Zauderer.[240] It noted that because Zauderer's statements about the Dalkon Shield were neither false nor deceptive, Ohio must establish that "prohibiting the use of such statements to solicit or obtain legal business directly advances a substantial governmental interest."[241] The Court rejected three proferred state interests. First, it rejected the argument that this ban served the same purposes as a ban on in-person solicitation previously upheld by the Court in the *Ohralik* case.[242] The Court reasoned that in-person solicitation is a practice rife with possibilities for overreaching, invasion of privacy, fraud, and undue influence, whereas, a printed advertisement containing advice about a specific legal problem does not involve the same pressure on a potential client for an immediate yes or no answer to the offer of representation.[243] Second, the Court disapproved of the argument that because Zauderer's

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> does not concern unlawful activities, however, may be restricted only in the service of a substantial government interest, and only through means that directly advance that interest.

105 S. Ct. at 2275 (citing Friedman v. Rogers, 440 U.S. 1 (1979); Pittsburgh Press Co. v. Human Relations Comm'n, 413 U.S. 376 (1973); Central Hudson Gas & Electric Corp. v. Public Service Comm'n, 447 U.S. 557 (1980)).

[236] 447 U.S. at 566.

[237] 105 S. Ct. at 2280.

[238] *Id.* at 2281.

[239] *Id.* at 2283.

[240] *Id.* at 2280. White was joined by Brennan and Marshall on this point. *Id.* at 2284 (Brennan, J., concurring in part and dissenting in part).

[241] *Id.* at 2277.

[242] *Id.* White specifically rejected the application of Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447 (1978), to this set of facts. White quoted from *Ohralik*: "[I]n-person solicitation of professional employment by a lawyer does not stand on a par with truthful advertising about the availability and terms of routine legal services." 105 S. Ct. at 2277 (quoting *Ohralik*, 436 U.S. at 455).

[243] 105 S. Ct. at 2277.

advertisement might promote lawsuits, the advertisement should be banned.[244] The Court reasoned that a state cannot interfere with a citizen's right of access to the courts.[245] Finally, the state argued that it needed a prophylactic rule, even if Zauderer's advertisement was harmless, because advertising by attorneys presents unique regulatory difficulties. The Court, however, did not answer the question of whether a prophylactic rule is ever permissible in this area. Instead, it found that the state had failed to establish that such a rule was necessary in this case to achieve a substantial governmental interest.[246] The Court noted that it is often difficult to determine whether advertisements for both legal services and products are deceptive. Therefore, the Court found no basis for the state's argument that such advertising by attorneys should be subject to a blanket prohibition.

With respect to Ohio's rule that prohibited the use of illustrations in attorney advertising, the Court applied the *Central Hudson* test and found that the state had failed to present a substantial state interest which justified its restriction.[247] The Court rejected the state's argument that the restriction was justified as a means of ensuring that attorneys maintain their dignity. The Court stated that this interest was not substantial enough to justify abridging an attorney's first amendment rights.[248] The Court also rejected the state's argument that any possible abuses could only be combatted through the use of a blanket ban on illustrations since it would be difficult to prove which illustrations were misleading.[249] The Court reasoned that consumers rarely base decisions about legal services on visual illustrations in advertisements.[250] Also, because the advertisements could be policed on a case-by-case basis, the Court concluded that the prophylactic approach taken by Ohio was invalid.[251] Thus, Zauderer could not be disciplined for his use of an accurate and nondeceptive illustration.

Zauderer lost on the issue of the right of Ohio to discipline attorneys who fail to disclose the terms of any contingent fees mentioned in their advertising.[252] The Court held that an advertiser's rights are adequately

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[244] *Id.* at 2278. The Court noted, "[W]e cannot accept the notion that it is always better for a person to suffer a wrong silently than to redress it by legal action." *Id.* (quoting *Bates*, 433 U.S. at 376).

[245] *Id.*

[246] *Id.* at 2278-79.

[247] *Id.* at 2281. White was joined by Brennan and Marshall on this point. *Id.* at 2284 (Brennan, J., concurring in part and dissenting in part). Justices O'Connor, Burger, and Rehnquist concurred in the Court's judgment on this point. *Id.* at 2294 (O'Connor, J., concurring in part and dissenting in part). The Court was thus unanimous in its rejection of Ohio's rule prohibiting the use of illustrations.

[248] *Id.* at 2280.

[249] *Id.* at 2281.

[250] *Id.*

[251] *Id.*

[252] *Id.* at 2282. White was joined by Justices O'Connor, Burger, and Rehnquist on this point. *Id.* at 2294 (O'Connor, J., concurring in part and dissenting in part).

protected as long as a state's disclosure requirements are reasonably related to its interest in preventing consumer deception.[253] The Court distinguished rules that prohibit speech from those that require disclosure. Because first amendment interests implicated by disclosure requirements are substantially less than those at stake when speech is suppressed, the Court reasoned that the state's rule should not fail just because the state did not employ the least restrictive means of regulation available.[254] Specifically, the Court found that the advertisement in question that stated if there was no recovery, no legal fees would be owed would mislead readers into believing it would cost them nothing to file suit.[255] In reality they would still be liable for the *costs* of the actions even if they lost. Presumably because the possibility of deception was so obvious, the state did not have to present evidence to support its position that such an advertisement is deceptive.[256]

The final issue in this case was whether Zauderer had been denied procedural due process with respect to his drunk driving advertisement. Zauderer contended that because the Ohio Supreme Court and the Board of Commissioners had determined that Zauderer's advertisement was misleading and deceptive on a completely new theory than that asserted against him by the Office of Disciplinary Counsel, he had been denied

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[253]*Id.* at 2282. White stated, "[T]he requirement that an attorney advertising his availability on a contingent-fee basis disclose that clients have to pay costs even if their lawsuits are unsuccessful (assuming that to be the case) easily passes muster under this standard." *Id.* at 2283. White is not saying that the first amendment does not apply to disclosure requirements. Rather, under certain circumstances, he recognizes that "unjustified or unduly burdensome disclosure requirements might offend the First Amendment by chilling protected commercial speech." *Id.* at 2282.

[254]*Id.* at 2282 n.14.

[255]*Id.* at 2283.

[256]The Court stated, "The State's position that it is deceptive to employ advertising that refers to contingent-fee arrangements without mentioning the client's liability for costs is reasonable enough to support a requirement that information regarding the client's liability for costs be disclosed." *Id.* at 2283.

White does concede that it is difficult to tell how burdensome the disclosures requested by the Ohio Supreme Court are in light of the Ohio court's failure to specify precisely what disclosures were required. *Id.* at 2283 n.15. The report of the Board of Bar Commissioners "at a minimum suggests that an attorney advertising a contingent fee must disclose that a client may be liable for costs even if the lawsuit is unsuccessful. The report and the opinion of the Ohio Supreme Court also suggest that the attorney's contingent-fee rate must be disclosed. Neither requirement seems intrinsically burdensome . . . ." *Id.* (citing Office of Disciplinary Counsel v. Zauderer, 10 Ohio St. 3d 44, 48, 461 N.E.2d 883, 886 (1984)). White admits that the Ohio Supreme Court's opinion regarding precisely what must be disclosed is vague, and that Ohio's DR 2-101(B)(15) really only mandated disclosure of contingent fee *rates*. He then noted that Zauderer's advertisement did not refer to rates. Therefore, White concluded it might be improper to attempt to *disbar* an attorney on the basis of this rule as it would raise "significant due process concerns." *Id.* Nonetheless, because only a public reprimand was issued here, he saw no problem with the application of this rule to Zauderer's advertisement. *Id.*

due process. The Court found that because the decision of the Board of Bar Commissioners had put Zauderer on notice of the charges he had to answer before the Supreme Court of Ohio, he had been afforded notice and an opportunity to respond. Thus, there had been no violation of due process.[257]

Justice Brennan, who was joined by Justice Marshall, filed a separate opinion, concurring in part and dissenting in part. The Justices agreed with the majority that a state may not discipline an attorney for publishing advertisements that contain truthful and nondeceptive advice about specific legal problems and accurate illustrations.[258] The Justices dissented primarily on two points. First, they stated that Ohio's vague disclosure requirements regarding contingent fees were not reasonably related to the state's interest in preventing consumer deception.[259] Second, they found that Ohio's punishment of Zauderer violated his due process rights.[260]

With respect to Ohio's disclosure requirements, Brennan agreed with the majority that disclosure requirements must be reasonably related to a state's interest in preventing consumer deception, but only to the extent that this "reasonable relationship" inquiry is consistent with the *Central Hudson* test.[261] Therefore, the state must demonstrate that its regulation directly advances a substantial state interest. Brennan observed that it was difficult to determine precisely what disclosure requirements the majority had approved.[262] He concluded that the Supreme Court of Ohio had imposed three requirements with respect to disclosures: first, if an advertisement refers to contingent fees, it should indicate whether additional costs might be assessed to the client; second, that an attorney advertising a contingent fee must specifically express his rates; and third, that an attorney must *fully* disclose the terms of a contingent fee contract in his advertising.[263] Brennan proceeded to analyze these requirements in light of the first amendment standard set forth above.

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[257]105 S. Ct. at 2284. Zauderer also contended that he was prejudiced because he could not present evidence before the Ohio Supreme Court concerning the Board's conclusion that drunken driving cases are often plea bargained to a lesser offense. However, White noted Zauderer probably could not argue that plea bargaining is not common in such cases. Furthermore, Zauderer never argued before the Ohio Supreme Court that it was improper for the Board to take judicial notice of such pleas. *Id.* at 2284 n.17.

[258]*Id.* at 2284 (Brennan, J., concurring in part and dissenting in part).

[259]*Id.* at 2285.

[260]*Id.*

[261]*Id.* Brennan agreed that the distinction between suppression and disclosure in the commercial speech context merits some differences in analysis. *Id.* at 2285 n.1. "Nevertheless, disclosure requirements must satisfy the basic tenets of commercial-speech doctrine: they must demonstrably and directly advance substantial state interests, and they may extend no further than 'reasonably necessary' to serve those interests." *Id.*

[262]*Id.* at 2286.

[263]*Id.* at 2286-88.

With respect to the first point, the Ohio Supreme Court had ruled that an advertisement mentioning contingent fees should indicate whether "additional costs . . . might be assessed the client."[264] Brennan agreed that because of the public's general unfamiliarity with the difference between fees and costs, a state may require an advertisement to include a costs disclaimer.[265] He added a proviso, however, that the disclaimer should not be broader than is reasonably necessary to prevent the deception.[266]

Second, the Ohio Supreme Court required that an attorney offering services on a contingent fee basis must specifically express his rates.[267] The majority upheld this requirement provided it is not unduly burdensome.[268] Brennan stated that whether such a requirement is burdensome or not is irrelevant unless the state can demonstrate that its requirement directly and proportionately furthers a substantial state interest.[269] Brennan concluded that Ohio had failed to demonstrate such evidence.

Third, Brennan noted that Ohio had found that Zauderer had acted unethically by failing to disclose *fully* the terms of his offer to represent people on a contingent fee basis.[270] Brennan concluded that such a requirement compelling the publication of detailed fee information that would fill more space than the ad itself was unduly burdensome and would chill protected commercial speech.[270] Brennan also concluded that because Ohio did not precisely specify what disclosures Zauderer was required to include in his advertisements, the rule failed to provide Zauderer with sufficient notice of what he should have included in his advertisements and therefore violated basic due process and first amendment guarantees.[272]

Brennan's second major point in dissent dealt with the issue of procedural due process. Brennan argued that it was improper for the Board of Commissioners to find that Zauderer's drunk driving advertisement

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[264]Office of Disciplinary Counsel v. Zauderer, 10 Ohio St. 3d 44, 48, 461 N.E.2d 883, 886 (1984).

[265]105 S. Ct. at 2287. (Brennan, J., concurring in part and dissenting in part). *See also In re* R.M.J., 455 U.S. at 203.

[266]*Id.*

[267]10 Ohio St. 3d at 48, 461 N.E.2d at 886.

[268]105 S. Ct. at 2283 n.15.

[269]*Id.* at 2287. (Brennan, J., concurring in part and dissenting in part).

[270]*Id.* at 2287-88 (citing Office of Disciplinary Counsel v. Zauderer, 10 Ohio St. 3d. at 47, 461 N.E.2d at 886) (emphasis in original).

[271]*Id.* Furthermore, such a requirement might clutter up an advertisement, causing it to be far less effective. Such information easily can be disclosed to clients on their first visit to an attorney's office.

[272]*Id.* at 2289. Brennan agreed that a state may require an advertising attorney to include a costs disclaimer, but he felt Ohio had not created a clear rule at the time Zauderer ran his advertisement. *Id.* Brennan worried that because the Ohio rules are so vague, they are a trap if attorneys even mention contingent fees. *Id.* However, White clearly indicated that a state could not disbar an attorney based upon such advertising and that Ohio should draft clearer rules. *Id.* at 2283 n.15.

was misleading and deceptive on a completely new theory that had not been brought up in the original complaint filed against him.[273] Because Zauderer was not given fair notice of the precise nature of the charges against him, and because on appeal the Ohio Supreme Court would be limited to reviewing whether the findings were against the weight of the evidence, Brennan concluded that the proceedings violated due process.[274]

Justice O'Connor, who was joined by Chief Justice Burger and Justice Rehnquist, also filed a separate opinion concurring in part and dissenting in part. Justice O'Connor concurred with the majority's conclusion that accurate illustrations in lawyer advertising cannot be prohibited, that the state's disclosure requirements concerning contingent fees should be upheld, and that Zauderer had not been denied due process.[275] O'Connor dissented from the majority's conclusion that Ohio's prohibition of soliciting business through legal advice in advertisements violated the first amendment.[276] She concluded for two reasons that the use of unsolicited legal advice poses enough risk of overreaching to justify its ban.[277]

First, because consumers are especially susceptible to confusion and deception when a professional markets his services, the ban is justified.[278] Second, an attorney's personal interest in securing new business may color the advice rendered in an advertisement.[279] The Justice found that the Dalkon Shield advertisement presented a risk of overreaching, but to a lesser degree than that incident to in-person solicitation.[280] This is true because where the legal advice is phrased in uncertain terms it induces a client to seek further legal advice in person where in-person solicitation can occur.[281] Thus, Justice O'Connor determined that Ohio's prohibition on soliciting business through legal advice in advertisements should have been upheld.

V. Implications of *Zauderer*

The Supreme Court's opinion in *Zauderer* has clarified various points concerning lawyer advertising that will have an impact on an attorney's practice. A central provision of the Code of Professional Responsibility at issue in *Zauderer* was DR 2-101(B),[282] which requires that advertisements

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[273]*Id.* at 2292-93 (Brennan, J., concurring in part and dissenting in part).

[274]*Id.* at 2293 (citing *In re* Ruffalo, 390 U.S. 544, 552 (1968)).

[275]*Id.* at 2294 (O'Connor, J., concurring in part and dissenting in part).

[276]*Id.*

[277]*Id.*

[278]*Id.* Specifically, she stated, "the State has a significant interest in preventing attorneys from using their professional expertise to overpower the will and judgment of lay people who have not sought their advice." *Id.* at 2296.

[279]*Id.* at 2294.

[280]*Id.* at 2296.

[281]*Id.*

[282]Model Code of Professional Responsibility DR 2-101(B) (1979).

be presented in a dignified manner without the use of illustrations and which provides a "laundry list" of information that can be published. Zauderer initially had been charged with including information in his advertisements that had not been authorized by the "laundry list" and with failing to advertise in a dignified manner.[283] Although neither the Board of Commissioners on Grievances and Discipline nor the Ohio Supreme Court found Zauderer guilty on these counts, they did find he had failed to comply with DR 2-101(B) by including an illustration[284] and by failing to disclose all the necessary information relating to contingent fees in his Dalkon Shield advertisement.[285]

Before considering the Supreme Court's treatment of these specific points in DR 2-101(B), the propriety of retaining the rule's "laundry list" approach to the regulation of attorney advertising will be considered.[286]

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[283]*See supra* notes 209-15.

[284]Office of Disciplinary Counsel v. Zauderer, 10 Ohio St. 3d 44, 47, 461 N.E.2d 883, 885-86.

[285]*Id.*

[286]The rule states:

In order to facilitate the process of informed selection of a lawyer by potential consumers of legal services, a lawyer may publish or broadcast, subject to DR 2-103, the following information in print media distributed or over television or radio brodcast in the geographic area or areas in which the lawyer resides or maintains offices or in which a significant part of the lawyer's clientele resides, provided that the information disclosed by the lawyer in such publication or brodcast complies with DR 2-101(A), and is presented in a dignified manner:

(1) Name, including name of law firm and names of professional associates; addresses and telephone numbers;
(2) One or more fields of law in which the lawyer or law firm practices, a statement that practice is limited to one or more fields of law, or a statement that the lawyer or law firm specializes in a particular field of law practice, to the extent authorized under DR 2-105;
(3) Date and place of birth;
(4) Date and place of admission to the bar of state and federal courts;
(5) Schools attended, with dates of graduation, degrees and other scholastic distinctions;
(6) Public or quasi-public offices;
(7) Military service;
(8) Legal authorships;
(9) Legal teaching positions;
(10) Memberships, offices, and committee assignments, in bar associations;
(11) Membership and offices in legal fraternities and legal societies;
(12) Technical and professional licenses;
(13) Memberships in scientific, technical and professional associations and societies;
(14) Foreign language ability;
(15) Names and addresses of bank references;
(16) With their written consent, names of clients regularly represented;
(17) Prepaid or group legal services programs in which the lawyer participates;
(18) Whether credit cards or other credit arrangements are accepted;
(19) Office and telephone answering service hours;

States vary considerably in the extent to which they have adopted the precise language used in the American Bar Association's Model Code of Professional Responsibility — with some states following the Model Code very closely and other states deviating from the language quite substantially.[287] For the most part, Ohio's version of DR 2-101(B), at issue in *Zauderer*, differed very little from the Model Code.[288] It should be noted that in place of DR 2-101(B), the American Bar Association's new Model Rules of Professional Conduct, adopted by the House of Delegates of the American Bar Association on August 2, 1983, does away with the "laundry list" approach and essentially replaces it with a false and misleading standard.[289] In other words, lawyers may include any information in their ads so long as it is not false, fraudulent, or misleading.

In considering the constitutionality of Ohio's version of DR 2-101(B), it should be borne in mind that this rule restricts the free flow of infor-

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(20) Fee for an initial consultation;
(21) Availability upon request of a written schedule of fees and/or an estimate of the fee to be charged for specific services;
(22) Contingent fee rates subject to DR 2-106(C), provided that the statement discloses whether percentages are computed before or after deduction of costs;
(23) Range of fees for services, provided that the statement discloses that the specific fee within the range which will be charged will vary depending upon the particular matter to be handled for each client and the client is entitled without obligation to an estimate of the fee within the range likely to be charged, in print size equivalent to the largest print used in setting forth the fee information;
(24) Hourly rate, provided that the statement discloses that the total fee charged will depend upon the number of hours which must be devoted to the particular matter to be handled for each client and the client is entitled to without obligation an estimate of the fee likely to be charged in print size at least equivalent ot the largest print used in setting forth the fee information;
(25) Fixed fees for specific legal services, the description of which would not be misunderstood or be deceptive, provided that the statement discloses that the quoted fee will be available only to clients whose matters fall into the service described and that the client is entitled without obligation to a specific estimate of the fee likely to be charged in print size at least equivalent to the largest print used in setting forth the fee information.

MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 2-101(B) (1979).

[287] *See* Andrews, *Lawyer Advertising and the First Amendment*, AM. B. FOUND. RESEARCH J. 967, 986-88 (1981).

[288] *See supra* note 198 and accompanying text.

[289] *See supra* note 19. Under a false and deceptive standard, the public would receive more information than that permitted by the "laundry list."

One could argue that the false and deceptive standard requires more of an enforcement effort than rules that state exactly what may appear in an advertisement. However, when weighing the need of the public for more information against the possible extra enforcement effort that might be needed to police a false and deceptive standard, the need for information seems to suggest a false and deceptive standard should be the rule.

mation between attorneys and prospective clients in contradiction to the right of the public to receive such information, a point enunciated in *Bates v. State Bar of Arizona*.[290] Such information assists the public in learning about the legal system.[291] When a state limits the speech of lawyers to the categories mentioned in DR 2-101(B), according to the *Central Hudson* test, it must assert a substantial state interest that directly supports the restriction and is drawn in the least restrictive manner possible.[292] A number of possible state interests could be asserted in defense of such a regulation. The state has an interest in ensuring that the public receives adequate and accurate information concerning legal services. However, this rule unnecessarily restricts the quantity of information available to the public.[293] Alternatively, the rule could be viewed as a way of maintaining high professional standards. In fact, as the Court enunciated in *Bates*, such a rule is a poor way to deter shoddy work.[294] It might also

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[290]433 U.S. 350, 364 (1977). *See also* Bolger v. Youngs Drug Products Corp., 463 U.S. 60 (1983); Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 770 (1976).

[291]Bates v. State Bar of Arizona, 433 U.S. 350, 364. The Court recognized the interest of consumers in learning as much as possible about all types of commercial speech:

> The listener's interest is substantial: the consumer's concern for the free flow of commercial speech often may be far keener than his concern for urgent political dialogue. Moreover, significant societal interests are served by such speech. Advertising, though entirely commercial, may often carry information of import to significant issues of the day. And commercial speech serves to inform the public of the availability, nature and prices of products and services, and thus performs an indispensible role in the allocation of resources in a free enterprise system.

Id. (citing Bigelow v. Virginia, 421 U.S. 809 (1975)).

[292]Central Hudson Gas & Electric Corp. v. Public Service Comm'n, 447 U.S. 557 (1980).

[293]There are less restrictive means of regulation that make certain the public receives accurate information — such as a false or deceptive standard of regulating advertising.

In her opinion in the *Zauderer* case, Justice O'Connor noted that the public does not have to rely upon legal advertising as its exclusive source of information about the law. "Ohio and other states afford attorneys ample opportunities to inform members of the public of their legal rights. *See, e.g.*, Ohio DR 2-104(A)(4) (permitting attorneys to speak and write publicly on legal topics as long as they do not emphasize their own experience or reputation)." 105 S. Ct. at 2297 (O'Connor, J., concurring in part and dissenting in part).

[294]*See* Bates v. State Bar of Arizona, 433 U.S. 350, 378 (1977). "Restraints on advertising, however, are an ineffective way of deterring shoddy work. An attorney who is inclined to cut quality will do so regardless of the rule on advertising." *Id.*

In essence, the state argued that the public should be protected from its lack of sophistication about legal matters. The Court rejected this argument in Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748 (1976). "There is . . . an alternative to this highly paternalistic approach. That alternative is to assume that this information is not in itself harmful, that people will perceive their own best interests if only they are well enough informed, and that the best means to that end is to open the channels of communication rather than to close them . . . ." *Id.* at 770.

prevent attorneys from promoting litigation. In *Bates*, however, the Court rejected the argument that it is improper to advise people via advertising of their right to sue.[295] Furthermore, it could be argued that advertising should be informational and not promotional. The Court, however, has ruled that commercial speech cannot be regulated merely because it is promotional.[296] Arguably, DR 2-101(B) prevents deception, which the state has a substantial interest in preventing. However, Ohio's rule, by limiting the type of information that can be advertised, may result in deceptive advertising nonetheless.[297] Furthermore, the rule arguably advances the state's interest in preventing an adverse effect on the professionalism of attorneys. The Supreme Court, however, rejected in *Bates* the argument that the regulation of advertising promotes this goal.[298] DR 2-101(B) therefore violates the *Central Hudson* test because it does not directly advance any substantial governmental interest.

Further, DR 2-101(B) fails the second part of the *Central Hudson* test because the "laundry list" approach to regulating advertising clearly is not the least restrictive means of accomplishing any of the above-mentioned state interests. The states using DR 2-101(B) could easily adopt other rules that impinge upon an attorney's free speech in a more limited manner, as required by *In re R.M.J.*[299] and *Central Hudson*.[300] For example, the false and misleading standard adopted by the American Bar Association accomplishes the same ends as DR 2-101(B), but gives attorneys greater latitude in designing their advertising.[301]

As mentioned previously, the Court did not consider the "laundry list" aspect of Ohio's DR 2-101(B) in the *Zauderer* case. At some point in the future, the Court should reconsider this rule and insist that states adopt the false and deceptive standard enunciated in the American Bar Association's Model Code of Professional Conduct. This rule is more beneficial because it permits attorneys to provide more information to the public.

Indirectly, of course, the Supreme Court has invalidated Ohio's DR 2-101(B) because the rule does not specifically permit attorneys to include

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[295]"Although advertising might increase the use of the judicial machinery, we cannot accept the notion that it is always better for a person to suffer a wrong silently than to redress it by legal action." 433 U.S. at 376. *See supra* note 243 and accompanying text. Justice White in *Zauderer* specifically ruled an attorney may advise people of their legal rights in advertising. 105 S. Ct. at 2280.

[296]Bates v. State Bar of Arizona, 433 U.S. 350, 371-72 (1977).

[297]For example, if a rule permits a lawyer to state the areas in which he is available to practice, such a rule would permit a lawyer to advertise he is available to practice in an area in which he has no experience.

[298]433 U.S. at 368-69.

[299]455 U.S. 191, 206 (1982).

[300]447 U.S. 557, 571 (1980).

[301]*See supra* note 198 and accompanying text.

legal advice in their advertising, as required by *Zauderer*. However, about all one can say at this point is that Ohio must add the right to include legal advice in advertising to the list of other permissible information to be included in legal advertising.

With respect to the specific violations of DR 2-101(B) assessed against Zauderer, the rule limiting illustrations to those of a picture of the advertising lawyer or the scales of justice should next be considered.[302] Obviously, one of the goals of an advertising campaign is to catch the attention of the reader. The reader who skims through a paper will not consciously notice many of its articles and advertisements. To be worthwhile, the advertisement must cause a few readers to stop and at least glance at the advertisement. Zauderer advertised both with and without the illustration of the Dalkon Shield. The advertisement without the illustration produced no response.[303]

Even in the seminal case, *Bates v. State Bar of Arizona*, the plaintiffs had used an illustration of the scales of justice.[304] Likewise, R.M.J. had used an illustration of the scales of justice.[305] Presumably, a rule that prohibits the use of illustrations is motivated by a desire that the advertisements be dignified.[306] However, the Supreme Court has rejected a distaste for advertising as a basis for suppressing it.[307] Furthermore,

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[302]DR 2-101(B) prohibits all illustrations except for a picture of the lawyer or a portrayal of the scales of justice. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 2-101(B) (1979).

[303]*See* Brief for Appellant at 14-15, Zauderer v. Office of Disciplinary Counsel, 105 S. Ct. 2265 (1985). In contrast, he received 95 responses to the advertisement with the illustration. Brief for Appellant at 5. *See supra* note 204. Presumably, the advertisement without the illustration did not catch the attention of women reading the newspapers. The women very possibly had no idea what type of intrauterine device they had been using. The illustration of the very distinctive I.U.D. in this case obviously caught the attention of many readers. What is the point in placing an advertisement that no one reads?

[304]433 U.S. at 385. Presumably, Ohio permitted the use of such an illustration because the Court upheld the right of Bates to place such an advertisement in a newspaper. It is interesting to note that many of the rules adopted by the states after *Bates* did not permit the advertisement in the *Bates* case. *See* Andrews, *Lawyer Advertising and the First Amendment*, 1981 AM. B. FOUND. RESEARCH J. 967, 971 (1981).

[305]*In re* R.M.J., 455 U.S. 191, 207. The Court did not comment on this illustration but upheld his right to place the advertisement thus implicitly permitting the illustration. *Id.* (See Appendix G.).

[306]Ohio Code of Professional Responsibility DR 2-101(B) reads in part: "The information disclosed by the lawyer in such publication or broadcast shall . . . be presented in a dignified manner . . . ." OHIO CODE OF PROFESSIONAL RESPONSIBILITY DR 2-101(B) (1982). *See supra* note 198.

[307]*See* Bates v. State Bar of Arizona, 433 U.S. at 368, where the Court discusses the argument that advertising allegedly diminishes the dignity of the profession. The Court in *Bates* noted that the bar on advertising originated as a rule of etiquette, and that the view that lawyers are "above" trade has become an anachronism. *Id.* at 371-72. *See also* Carey v. Population Services Int'l, 431 U.S. 678, 701 (1977), where the Court remarked

there is no substantial governmental interest advanced by a rule that permits some types of illustrations but prohibits all others. The Ohio Supreme Court never indicated what governmental interest was advanced by such a rule, but instead merely indicated that illustrations in general may be misleading.[308] This is particularly important because this rule clearly interferes with the right of the public to receive information to assist in selecting a lawyer. This rule fails to comport with the requirement articulated in *In re R.M.J.* that speech must be regulated "with care and in a manner no more extensive than reasonably necessary to further substantial interests."[307]

Clearly, the Supreme Court was correct in striking down Ohio's blanket ban on the use of illustrations in advertisements. So long as the illustration used by an attorney is accurate and not deceptive, an attorney will be able to use it. It is doubtful, however, that extensive use of illustrations will appear in advertising. The Dalkon Shield's unique design made it particularly useful in the advertising to alert readers to the product in question. Illustrations in general, however, probably will not be all that useful for attorneys to include in their advertising.

Zauderer had been charged with violating DR 2-101(B) by offering to represent women in Dalkon Shield cases on a contingency basis without first disclosing how the fees would be computed.[310] No real substantial governmental interest was asserted to support this rule,[311] as required by *Central Hudson*.[312] Even so, the Court ruled against Zauderer because

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that offensiveness is not a justification for suppressing expression.

Justice White in *Zauderer* acknowledged that this was probably the reason for the rule prohibiting the use of other illustrations. 105 S. Ct. at 2280. White also observed, "[A]lthough the State undoubtedly has a substantial interest in ensuring that the attorneys behave with dignity and decorum in the courtroom, we are unsure that the State's desire that attorneys maintain their dignity in their communications with the public is an interest substantial enough to justify the abridgment of their First Amendment rights." *Id.*

[308]Office of Disciplinary Counsel v. Zauderer, 10 Ohio St. 3d 44, 47, 461 N.E.2d 883, 886 (1984). *Cf. In re* R.M.J., 455 U.S. 191, 202, 205-06 (where the Court indicated that the state must offer evidence that the challenged advertising is in fact deceptive or misleading).

[309]455 U.S. at 207.

[310]*See supra* notes 198, 231 and accompanying text. DR 2-101(B) permits the publication of such information. "Only the following information may be published or broadcast . . . [c]ontingent fee rates subject to DR 2-106(C), provided that the statement discloses whether percentages are computed before or after deduction of court costs and expenses." Zauderer failed to disclose this information in his advertisement.

[311]The Ohio Supreme Court merely noted with respect to this issue: "Also, requirements relative to the content of the advertising concerning legal fees would be permissible under the United States Supreme Court rulings cited. Certainly for purposes of clarity to those reading a lawyer advertisement which refers to contingent fees, the requirement should be that such fees be specifically expressed, as well as any additional costs that might be assessed the client." Office of Disciplinary Counsel v. Zauderer, 10 Ohio St. 3d 44, 48, 461 N.E.2d 883, 886 (1984).

[312]447 U.S. at 566.

it felt that the *Central Hudson* test should *not* be applied to an offer to represent women on a contingent fee basis.[313] Instead, the Court created a new rule — that the disclosure requirements must be "reasonably related to the State's interest in preventing deception of consumers."[314] While everyone on the Court agreed that the advertisement in question could be misleading, Brennan and Marshall in their separate opinion correctly pointed out that it was not at all clear what rule had been approved by the Court.[315] There is no doubt that states must clearly specify what must be disclosed in an advertisement with respect to the costs of litigation and the rates an attorney charges. Any rule that is not drafted clearly probably will not receive the approval of the Supreme Court.[316] States will need to check their disclosure requirements to make certain they are clearly stated in order to give notice of what must be disclosed.

Zauderer had also been charged with violating DR 2-103(A), which prohibits a lawyer from recommending employment of himself to one who has not sought his advice regarding the employment of a lawyer,[317] and with violating DR 2-104(A), which prohibits a lawyer from accepting employment after giving unsolicited advice to an individual to obtain counsel or to take legal action.[318] The Ohio disciplinary authorities felt that his Dalkon Shield advertisement constituted solicitation by recommending that readers employ him. This is perhaps the most absurd point with respect to this case, for it is the purpose of all advertising to generate business for the advertiser.

It is in the best interest of the public to receive as much information about lawyers as possible.[319] A rule that prohibits lawyers from taking cases that result from an advertisement would discourage any lawyer from ever placing an advertisement. This would consequently decrease the amount of information provided to the public about lawyers.[320]

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[313] *See supra* note 252.

[314] 105 S. Ct. at 2282.

[315] *Id.* at 2286 (Brennan, J., concurring in part and dissenting in part).

[316] *See supra* note 256.

[317] *See supra* note 213.

[318] *See supra* note 214.

[319] Ohio Code of Professional Responsibility Ethical Consideration 2-1 states: "The need of members of the public for legal services is met only if they recognize their legal problem, appreciate the importance of seeking assistance, and are able to obtain the services of acceptable legal counsel. Hence, important functions of the legal profession are to educate laymen to recognize their legal problems, to facilitate the process of intelligent selection of lawyers, and to assist in making legal services fully available." OHIO CODE OF PROFESSIONAL RESPONSIBILITY EC 2-1 (1982).

Canon 2 of the American Bar Association Model Code of Professional Responsibility states: "A lawyer should assist the legal profession in fulfilling its duty to make legal counsel available." MODEL CODE OF PROFESSIONAL RESPONSIBILITY Canon 2 (1979).

[320] The public desperately needs information concerning lawyers. One study has indicated that the vast majority of the people have no way of knowing which lawyers are competent

The Court was correct in striking Ohio's prohibition on soliciting business through advice in advertisements. The Ohio authorities confused the distinction between advertising and solicitation, a distinction previously recognized by the Supreme Court.[321] Furthermore, the state failed to advance any substantial state interest to support its position. Clearly, the need of the public for such information is very great and would require that the state assert a very substantial interest to merit banning such advertising.

In sum, the Supreme Court created a good rule that will enable attorneys to include more information concerning legal matters in their advertising. This will be beneficial to the public because many people do not understand the law and very often do not realize when they have a right to bring suit. The decision in the *Zauderer* case on this point is likely to have the greatest impact on legal advertising of all the issues discussed in this case. It is quite likely that attorneys will include such material in their advertisements in the future.

VI. Conclusion

The United States Supreme Court, starting with the decision in *Bates v. State Bar of Arizona* in 1977, began to open the doors to legal advertising. It has since that time ruled in three other relevant cases: *In re Primus, Ohralik v. Ohio State Bar Association*, and *In re R.M.J.* Its most recent pronouncement in this area, *Zauderer v. Office of Disciplinary Counsel*, has further clarified various issues regarding attorney advertising.[322]

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to handle their legal problems. B. Curran, The Legal Needs of the Public: The Final Report of a National Survey 228 (1977). Perhaps even more shocking is the fact that many *attorneys* do not know how to locate an attorney with expertise in a certain field. Stern, *Dabbling is Dangerous*, J. Mo. B. 121, 122 (March, 1985).

At one time many people believed that an attorney obtained business by developing a reputation in the community. The Supreme Court questioned the value of a reputation in securing new business in *Bates v. State Bar of Arizona*. "Although the system may have worked when the typical lawyer practiced in a small homogeneous community in which ascertaining reputational information was easy for a consumer, commentators have seriously questioned its current efficacy." 433 U.S. at 374 n.30.

One might question in any event whether a personal reputation or personal contacts with lawyers and the business community is more helpful in securing new business. It is far more likely that people will hire an attorney whom they know, as opposed to basing their hiring decision strictly on a lawyer's reputation.

[321]Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 460, 462 n.20 (1978). The Court noted in this case that while advertising "simply provides information and leaves the recipient free to act upon it or not, in-person solicitation may exert pressure and often demands an immediate response, without providing an opportunity for comparison or reflection." *Id.* at 457.

[322]Along with this line of cases has come an increase in the incidence of advertising by lawyers. The percentage of lawyers who have tried advertising has grown from 3% in 1978 to 24% in 1985. Recent increases are especially noticeable. The percentage of lawyers

Bates established that attorneys unquestionably have a right to advertise, and the public has a right to receive this information. *Primus* and *Ohralik*, however, established that attorneys may not directly solicit clients; *In re R.M.J.* moved the law a giant leap forward by adopting the *Central Hudson* test for legal advertising. That test states that commercial speech concerning a lawful activity and not false, deceptive, or misleading is protected by the first amendment. If a state attempts to regulate such speech, the regulation must directly advance a substantial state interest, and the regulation must be no more extensive than is necessary.

Justice White, in *Zauderer v. Office of Disciplinary Counsel*, applied the *Central Hudson* test in arriving at the conclusion that an attorney cannot be disciplined for soliciting legal business through advertising that contains truthful and nondeceptive information and advice regarding the legal rights of potential clients. He also relied upon the *Central Hudson* test in striking down Ohio's rules prohibiting the use of illustrations in advertising. Justice White, however, rejected the application of the *Central Hudson* test with respect to Ohio's requirement that certain information be disclosed in advertising mentioning contingent fees. Instead, the Court held that an advertiser's rights are adequately protected as long as the state's disclosure requirements are reasonably related to its interest in preventing consumer deception.

Perhaps it is regrettable that the Court did not continue to adhere to the *Central Hudson* test on the disclosure issue. At least adhering to the same rule adds some consistency to the law and makes it more predictable. On the other hand, the Court certainly did not clarify exactly what disclosure requirements it was upholding. Nevertheless, it is clear that if states wish to require that certain matters be disclosed in advertising, the rules must be stated in such a manner that attorneys are put on notice as to what information must be disclosed in the advertising.

On the whole, the Court has made it clear that it wants to encourage dissemination of information in legal advertising. It is likely that we will see further clarifications regarding the ability of lawyers to advertise as courts continue to address this timely issue.

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who have advertised has almost doubled since 1983. *Lawyer Advertising Is on the Rise*, ABA Journal, Apr., 1986, at 44, col. 1. The use of television advertising has been growing, particularly among multi-office legal clinics and personal injury firms. Expenditures on television advertising for legal services totaled $38,261,600 for 1985, a 36% increase over 1984. *Lawyers Spending More on TV Ads*, Nat'l L.J., Apr. 7, 1986, at 32, col. 3-4.

Appendix A

Appendix B

WHEN IT COMES TO LOWERING THEIR PRICES, MOST LAWYERS' HANDS ARE TIED.

When it comes to lowering the prices they charge, most lawyers' hands are tied.

Their rent is high. Their volume is low. And their overhead is almost out of sight. Which means that when you retain a regular attorney, one way or another you're going to pay the price.

It isn't fair. But since law firms traditionally charge by time and expenses, it's little wonder they're so expensive.

Are you paying for your law firm's mistakes?

Simply put, we believe that one reason some lawyers' fees are so great, is because their overhead is so high.

We're smart enough to know that there's no way to keep your prices in check, when your expenses are way out of line. So before we ever opened our doors, we decided to open our eyes.

We took a look at the extra cost of downtown rents. We looked at the extravagance of client entertainment. And after we saw all the fancy desks and the overstuffed chairs, we knew how we could trim the rates. And trim our rates we did.

Competent work at competitive prices.

When you come to Marcus and Tepper, the first thing you'll find is a competent lawyer. The second is competitive prices.

In most cases, fixed fees determined by the task at hand. Not by the hands of a clock. At an average saving which is quite substantial.

To be specific, our fee for an uncontested Divorce is $275. An Adoption is $150. And a simple Will is a mere $30. (Exclusive of normal court costs, of course.) And if you're buying a house, the closing cost is $100, regardless of the cost of the home.

In short, anything a regular-priced lawyer does, Marcus and Tepper will do. And we'll do it for a good deal less.

Why some lawyers are fit to be tied.

If there's one thing some lawyers resent more than our reasonable rates, it's the way we promote them in full page ads. What's more they'd like to put an end to this practice.

At Marcus and Tepper, we strongly disagree.

We believe in aggressively advertising to generate a high volume of work. And staying open evenings and Saturdays to see it gets done.

And the more business we tend to do, the lower the price we can afford to charge. Which makes it more equitable for all.

After all, justice may be blind in the eyes of the law. But it's expensive in the hands of a lawyer.

Marcus & Tepper Attorneys At Law

8326 W. Burleigh, Milwaukee, Wis. 449-9700

Hours: Mon. and Thurs., 8:30 until 8 PM;
Tues., Wed., and Fri., 8:30 to 5. Saturday til Noon.

Appendix C

HOW TO HIRE A LAWYER WITHOUT GETTING TAKEN FOR A RIDE.

Few things are as frustrating as retaining an attorney.

Because the minute you walk into their office the meter starts to run. And since the wheels of justice can turn exceedingly slow, your bill can start to spiral fast.

It isn't fair. But since lawyers traditionally charge by the hour, until recently you had little choice.

Our lawyers practice what we preach.

In all candor, we believe the high cost of justice today is anything but just.

We believe lawyers should be compensated on the basis of what they do. Not how long it takes them to do it. We believe clients should be told what their case is going to cost. Long before they receive a statement. And we believe that a good law firm can afford to charge inexpensive fees, and still be financially rewarding.

What's more, we're willing to put our beliefs into practice.

Why other lawyers will hate this ad.

When you come to Marcus and Tepper, the first thing you'll notice is the high level of professionalism. The second is our schedule of prices.

In most cases, fixed fees determined by the task at hand. Not by the hands of a clock. At an average saving of one-half, and more.

To be specific, our fee for an uncontested Divorce is $275. An Adoption is $150. And a simple Will is a mere $30. (Exclusive of normal court costs, of course.) And if you're buying a house, the closing cost is $100, regardless of the cost of the home. A saving quite substantial.

In short, anything a regular-priced lawyer does, Marcus and Tepper will do. And we'll do it for a good deal less.

The more we do, the less we charge.

If you're wondering how we can maintain such a high standard of work at such unstandard rates, there's a simple explanation

Most lawyers are content to wait for unsolicited clients to come to them. So their clients have to pay for the time they spend waiting.

Not so with Marcus and Tepper.

We believe in aggressively advertising to generate a high volume of work. And staying open evenings and Saturdays to get it done.

And the more business we tend to do, the lower the price we can afford to charge. Which makes it more equitable for all.

Because when it comes to the law, your biggest legal problem shouldn't be your lawyer.

Marcus & Tepper Attorneys At Law

5325 W. Burleigh, Milwaukee, Wis. 449-9700
Hours: Mon. and Thurs., 8:30 to 8 PM,
Tues., Wed. and Fri. 8:30 to 5 PM,
Saturdays until Noon.

Appendix D

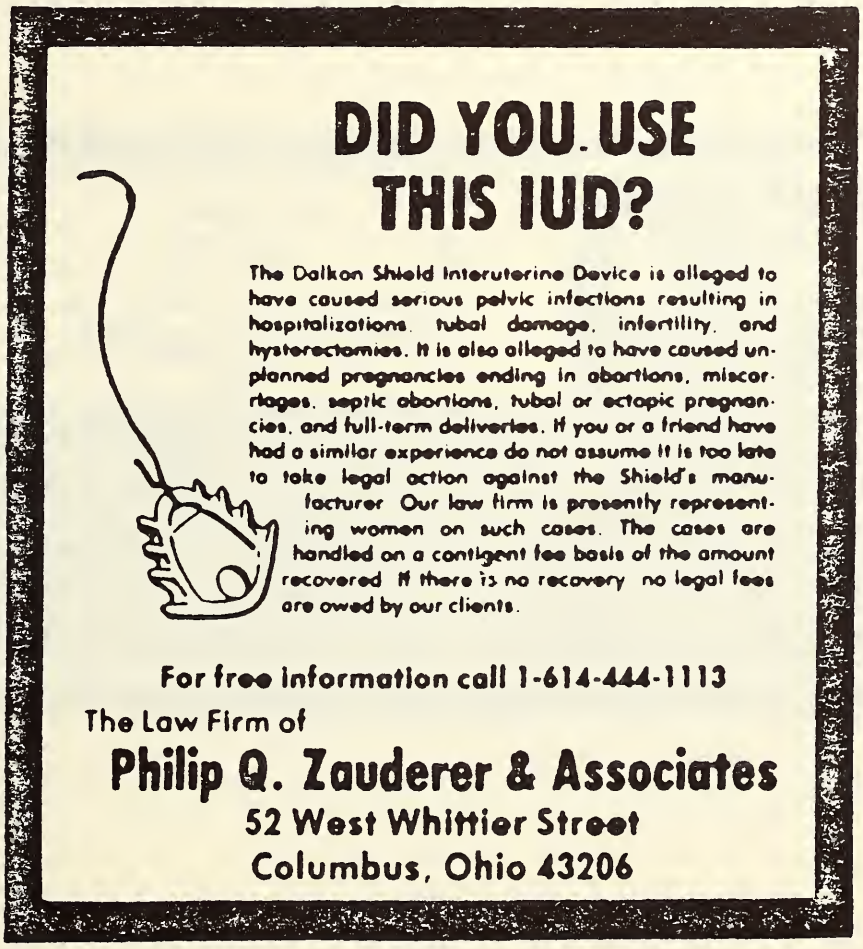
ATTACHMENT A

/Columbia, S.C., Thursday, July 16, 1981 9-B

STOP FORECLOSURE

Repossession, Creditor Harassment,
Consolidate or Get Out of Debt.
Call:
Harvey W. Burgess
1417 Gregg St. Columbia, S.C.
In Columbia Call: 254-2006
In Charleston Call: 571-3642

Appendix E



Appendix F

Appendix G

Notes

AIDS-Related Litigation: the Competing Interests Surrounding Discovery of Blood Donors' Identities

I. Introduction

First recognized in 1981, Acquired Immunodeficiency Syndrome (AIDS) has escalated to the forefront of national concerns.[1] As of June, 1985, 10,533 AIDS cases had been reported by the Centers for Disease Control (CDC).[2] Scientists predict that by 1987, 40,000 individuals will be diagnosed to have the incurable disease.[3] One class of individuals affected, approximately two percent of the total AIDS population,[4] are those who contracted the disease through blood transfusions. The following hypothetical illustrates the plight of individuals who contracted AIDS from blood transfusions necessitated by another's negligence.

John Doe, a married father of two children, is injured in an automobile accident because of the negligence of a hit and run driver. Doe is taken to a local hospital where he receives multiple units of blood to replace the blood lost through his injuries. Eventually, Doe is released to his home and family.

One year later, Doe's third child is born. For some reason, the infant has persistent fevers and unexplained body rashes. Doe is weak, has night sweats, and is unable to report to work regularly. His wife,

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[1] *See* Goldsmith, *Not There Yet, But "On Our Way" in AIDS Research, Scientists Say*, 253 J. A.M.A 3369 (1985).

[2] *See* Marwick, *"Molecular Level" View Gives Immune System Clues*, 253 J. A.M.A. 3371 (1985). *See also* Centers for Disease Control, U.S. Pub. Health Serv., *Update: Aquired Immunodeficiency Syndrome-United States, reprinted in* 255 J. A.M.A. 593, 593 (1986):

> Between June 1, 1981, and Jan. 13, 1986, physicians and health departments in the United States notified the CDC of 16,458 patients (16,227 adults and 231 children) meeting the acquired immunodeficiency syndrome (AIDS) case definition for national reporting. Of these, 8,361 (51% of the adults and 59% of the children) including 71% of the patients diagnosed before July, 1984, are reported to have died. The number of cases reported during each six-month period continues to increase . . . although not exponentially, as evidenced by the lengthening case-doubling times . . . .

(footnotes omitted). The case-doubling time as of January, 1986, is eleven months as compared to a doubling time of five months in July, 1982. *Id.* at 593.

[3] Krim, *AIDS: The Challenge to Science and Medicine*, 1985 Hastings Center Rep. Special Supplement 3.

[4] Centers for Disease Control, U.S. Pub. Health Serv., *Update: Acquired Immunodeficiency Syndrome — United States, reprinted in* 253 J. A.M.A. 3391 (1985) [hereinafter cited as CDC].

who is experiencing similar symptoms, is unable to keep up with their three children.

Over time, Doe, his wife, and their infant child are diagnosed as having AIDS. The doctors explain that Doe most likely received the virus in one of the blood transfusions necessitated by the accident. Doe then passed the virus to his wife through the sharing of body fluids. She, in turn, passed the disease to their child in utero.

In the pending negligence lawsuit against the driver of the hit and run automobile, Doe's survivors seek to discover the names and addresses of the nonparty donors whose blood he received. They seek this information to prove aggravation of injuries, the development of AIDS which caused Doe's death, in order to receive full compensation for the injuries caused by the driver.[5] The issue, then, is whether Doe's survivors should be entitled to discover the names and addresses of the blood donors.

In a recent decision involving a similar fact situation, *South Florida Blood Service, Inc. v. Rasmussen*,[6] the Florida Court of Appeals denied discovery of the donors' identities.[7] In *Rasmussen*, the plaintiff served the nonparty blood bank with a subpoena duces tecum requesting the identities of the donors whose blood the plaintiff had received.[8] Asserting the rights of the donors, the blood institutions, and society, the blood bank opposed discovery.[9] The court held that the plaintiff's interest must yield to the donors' privacy interests and the societal and institutional interest of maintaining an adequate and healthy national blood supply.[10] Recognizing the "great public interest" involved, however, the court certified this issue to the Supreme Court of Florida:

> Do the privacy interests of volunteer blood donors and a blood service's interest in maintaining a strong volunteer blood donation system outweigh a plaintiff's interest in discovering the names and addresses of the blood donors in the hope that further discovery will provide some evidence that he contracted AIDS from transfusions necessitated by injuries which are the subject of his suit?[11]

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[5]The aggravation of injuries doctrine holds a tortfeasor liable for all foreseeable intervening causes that increase the plaintiff's injuries Applying the doctrine to the hypothetical fact situation, the hit and run driver is liable for aggravated injuries resulting from the medical treatment of Doe's injuries. Because Doe required blood transfusions to treat his injuries, and because the blood transmitted AIDS to Doe, the tortfeasor is liable for the development of the disease and Doe's resulting death. *See* W. KEETON, D. DOBBS, R. KEETON & D. OWEN, PROSSER AND KEETON ON TORTS 303-10 (5th ed. 1984).

[6]467 So. 2d 798 (Fla. Dist. Ct. App. 1985).

[7]*Id.* at 804.

[8]*Id.* at 800.

[9]*Id.*

[10]*Id.* at 804.

[11]*Id.* at 804-05 n.13.

The Florida Supreme Court has yet to rule on this question.[12]

Because the incubation period for the AIDS virus can last for five years or longer,[13] the majority of transfusion transmission lawsuits have yet to surface.[14] Therefore, many courts will face the *Rasmussen* issue, or variations thereof, long after the Florida Supreme Court reaches its decision.

The purpose of this Note is to analyze the interests involved in such a fact situation, through a balancing test similar to that used in *Rasmussen*,[15] and to show that the plaintiff's interest in preserving his right to meaningful discovery, as well as his right to full compensation, deserves far greater weight than it has thus far been accorded. Specifically, this Note will demonstrate that the case law does not support *Rasmussen*'s sweeping extension of the disclosural right to privacy.[16] This Note will also show that the societal interest in maintaining an adequate and healthy blood supply, in light of the development of a highly accurate test for the detection of the AIDS virus in donated blood,[17] will not be compromised by allowing discovery.

II. The Disease Itself

To appreciate fully the complexity of the legal issues involved in a case such as *Rasmussen*, it is essential to understand the nature and effects of AIDS. Recognized as a disease entity since 1981,[18] AIDS has been declared the nation's top health priority by the federal government.[19] As of June, 1985, $5.6 billion in medical treatment and lost income had been attributed to the 10,533 disease victims.[20] Because the disease is predicted to double its number of victims every ten to twelve months,[21] and because there is no known cure or vaccine for the fatal virus,[22] the number of individuals ultimately to be infected is incalculable.

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[12]The petitioner filed his brief with the Supreme Court of Florida on July 17, 1985. *See* Brief for Appellant, Rasmussen v. South Florida Blood Service, Inc., No. 67,081 (filed July 17, 1985) [hereinafter cited as Appellant's Brief].

[13]Krim, *supra* note 3, at 5.

[14]*See* Marwick, *Blood Banks Give HTLV-III Test Positive Appraisal at Five Months*, 254 J. A.M.A. 1681, 1683 (1985) (opinion of James Curran, M.D., of the Centers for Disease Control) ("Because of the long incubation period, there will continue to be cases of AIDS occurring associated with blood transfusions.").

[15]In order to determine whether discovery should be allowed, the *Rasmussen* court balanced the competing interests presented by South Florida and the plaintiff. 467 So. 2d at 801.

[16]*See infra* notes 136-37 and accompanying text.

[17]*See infra* notes 49-52 and accompanying text.

[18]Goldsmith, *supra* note 1, at 3369.

[19]*The New Victims*, Life, July, 1985, at 12, 19.

[20]Marwick, *supra* note 2, at 3371. *See also* Indianapolis Star, Aug. 5, 1985, at 1, col. 1 (45 confirmed AIDS cases in Indiana with 29 deaths); Indianapolis Star, Sept. 14, 1985, at 6, col. 1 (of the 13,074 AIDS victims in the United States, 6,611 have died).

[21]Krim, *supra* note 3, at 3.

[22]*Id.*

Defined by the CDC as "a disease, at least moderately predictive of a defect in cell-mediated immunity, occurring in a person with no known cause for diminished resistance to that disease,"[23] the AIDS virus has been given three names: (1) Human T-lymphotropic Virus Type III (HTLV-III); (2) Lymphadenopathy-Associated Virus (LAV); and (3) AIDS-Associated Retrovirus (ARV).[24] Transmission of the virus occurs through the sharing of body fluids, such as sperm, blood, and tears, and through the repeated use of unsterilized skin-piercing instruments.[25] Although no cases of transmission through saliva have been documented,[26] some scientists suggest that this mode of infection is possible.[27] It is not believed that the virus is transmissible through purely casual contact such as touching.[28]

Once introduced into the blood stream, the AIDS virus infiltrates the T-4 lymphocyte cells.[29] The T-4 cell, which has been described as the "true conductor of the immune orchestra," is responsible for activating nearly all of the immune system's disease-fighting processes.[30] Once infected, these cells manufacture the AIDS virus instead of fighting infection.[31] Ultimately, the immune system of the AIDS patient is so depressed that normally benign infections become life threatening.[32]

The AIDS virus, which is believed to have originated in Africa,[33]

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[23]Miller, O'Connell, Leipold & Wenzel, *Potential Liability for Transfusion - Associated AIDS*, 253 J. A.M.A. 3419, 3419 (1985) [hereinafter cited as Miller].

[24]Carlson, Bryant, Hinrichs, Yamamoto, Levy, Yee, Higgins, Levine, Holland, Gardner & Pederson, *AIDS Serology Testing in Low- and High-Risk Groups*, 253 J. A.M.A. 3405 (1985).

[25]Centers for Disease Control, U.S. Pub. Health Serv., *World Health Organization Workshop: Conclusions and Recommendations on Acquired Immunodeficiency Syndrome, reprinted in* 253 J. A.M.A. 3385 (1985) [hereinafter cited as *W.H.O.*].

[26]Krim, *supra* note 3, at 4.

[27]Elrod, *Now a Household Word, It's Invading "Straight World,"* Indianapolis Star, Aug. 4, 1985, at 1, col. 1 (quoting Dr. Kenneth Fife of the Indiana University School of Medicine).

[28]*W.H.O.*, *supra* note 25, at 3385.

[29]Marwick, *"Molecular Level" View Gives Immune System Clues*, 253 J. A.M.A. 3371 (1985).

[30]*Id.* at 3375 (quoting Anthony S. Fauci, M.D., Director of the Nat'l Inst. of Allergy and Infectious Diseases, Nat'l Insts. of Health).

[31]*Id.* at 3375.

[32]*Id. See* Centers for Disease Control, U.S. Pub. Health Serv., *Questions and Answers About Acquired Immunodeficiency Syndrome (AIDS)*, at 2-3 (1985) [hereinafter cited as *Questions and Answers*] (The two opportunistic diseases most often responsible for the death of AIDS patients are Kaposi's Sarcoma, a normally rare disease most often seen in elderly males, and Pneumocystis Carinii Pneumonia (PCP), which is ordinarily seen only in patients whose immune systems are suppressed secondary to leukemia or drug therapy.).

[33]Wallis, *AIDS: A Growing Threat*, Time, Aug. 12, 1985, at 44 (citing virologist Myron Essex of the Harvard School of Pub. Health).

occurs primarily in homosexual or bisexual men, intravenous drug abusers, and hemophiliacs.[34] The sexual partner of anyone in these three groups is considered to be at high risk to develop the disease.[35] Furthermore, the disease has been found in purely heterosexual individuals who have a history of multiple sexual partners or contacts with prostitutes.[36] In fact, some authorities suggest that a separate AIDS category should be established to represent heterosexuals who have multiple partners.[37]

It is estimated that up to one million Americans have been exposed to the AIDS virus.[38] Of that million, it is further estimated that five to ten percent will develop AIDS.[39] The remaining ninety to ninety-five percent will either carry the virus without developing symptoms or will develop AIDS-Related Complex, a mild version of the pure disease.[40] It is believed that this ninety to ninety-five percent may transmit the virus whether or not they themselves develop clinical manifestations of the disease.[41]

Approximately two percent of the AIDS cases are attributable to blood transfusions.[42] Of the ninety-two transfusion transmission cases under investigation by the CDC in June, 1985, eighty of the patients had received the blood during operations.[43]

Prior to 1985, blood centers did not employ uniform AIDS screening techniques.[44] Most centers posted signs informing those at high risk for the disease to refrain from donating blood.[45] Other centers provided

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[34]Krim, *supra* note 3, at 3. *See also* CDC, *supra* note 4, at 3387 (Haitians no longer represent a specific high-risk category).

[35]*See Questions and Answers*, *supra* note 32, at 3-4. *See also* Goldsmith, *More Heterosexual Spread of HTLV-III Virus Seen*, 253 J. A.M.A. 3377 (1985).

[36]Goldsmith, *supra* note 35, at 3378-79.

[37]Dean F. Echenberg, M.D., Ph. D., Director of the Bureau of Communicable Disease Control, San Francisco, suggests a separate category for heterosexuals with multiple partners. James W. Curran, M.D., and Harold W. Jaffee, M.D., of the Centers for Disease Control, however, do not predict a great rise in the number of heterosexual AIDS cases. However, the experts agree that prostitutes may become functional "reservoirs" for viral transmission to heterosexuals. *Id. See also* Wallis, *supra* note 33, at 43 (the CDC reports 118 cases of heterosexually transmitted AIDS).

[38]Krim, *supra* note 3, at 5. In late 1984, it was established that New York, California, New Jersey, and Florida were the states of origin for seventy-five percent of the AIDS cases. The remainder of the cases were traced to 41 other states plus Puerto Rico and the District of Columbia. *See Reports on AIDS Published in the Morbidity and Mortality Weekly Report*, (CDC) at 71 (Nov. 30, 1984).

[39]*See* Krim, *supra* note 3, at 5.

[40]*Id.*

[41]*Id. See also Rasmussen*, 467 So. 2d at 805 n.1 (Schwartz, C.J., dissenting).

[42]CDC, *supra* note 4, at 3391.

[43]Miller, *supra* note 23, at 3419.

[44]Office of Technology Assessment, Blood Policy and Technology, H.R. Doc. No. 260, 99th Cong., 1st Sess. 101 (1985) [hereinafter cited as O.T.A.].

[45]*Id.*

means by which the donors could anonymously indicate that their blood should not be used for transfusion.[46] Still others conducted surrogate tests for AIDS.[47] Many blood organizations declined to question donors about sexual habits because of moral and ethical considerations.[48]

In March, 1985, the Food and Drug Administration licensed the HTLV-III test for use in detection of AIDS antibodies.[49] Currently, the test is performed on all blood and plasma collected in the United States.[50] The test, which is 99.8 percent accurate,[51] does not diagnose AIDS; it merely detects the presence of antibodies to the virus, indicating that a person has been exposed to the disease.[52] Because of the test's effectiveness in detecting the AIDS antibody, medical science may have solved the problem of transfusion transmission of the disease. However, because the incubation period for the virus is estimated to range from two months to five years or longer,[53] and because one lot of infected blood could expose up to one hundred recipients,[54] the majority of transfusion related cases have yet to surface.

Regardless of the mode of transmission, there is no known cure for AIDS.[55] Because the virus mutates one hundred to one thousand times faster than any other virus, scientists have been unable to study its outer coat long enough to decode its secret formula and prepare a vaccine.[56] Although scientific evaluation of AIDS continues, those afflicted with the disease today face almost certain death.[57]

As noted by the majority in *Rasmussen*, "The public has reacted to the disease with hysteria. Reported accounts indicate that victims of AIDS have been faced with social censure, embarrassment, and discrimination in nearly every phase of their lives, including jobs, education,

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[46]*Id.* (The American Red Cross adopted a method whereby donors could call the center after donation to indicate whether their blood should be used for transfusion.)

[47]*Id.*

[48]Miller, *supra* note 23, at 3421.

[49]Levine & Bayer, *Screening Blood: Public Health and Medical Uncertainty*, 1985 HASTINGS CENTER REP. SPECIAL SUPPLEMENT 8.

[50]*Id.*

[51]Wallis, *supra* note 33, at 44 (accuracy reported by the National Institutes for Health).

[52]Levine & Bayer, *supra* note 49, at 8.

[53]*Questions and Answers*, *supra* note 32, at 1.

[54]Miller, *supra* note 23, at 3419.

[55]Krim, *supra* note 3, at 2.

[56]Wallis, *supra* note 33, at 47 (statement of William Haseltine, M.D., affiliated with Harvard University's Dana-Farbour Cancer Institute). *See also* Krim, *supra* note 3, at 4-5.

[57]Krim, *supra* note 3, at 2-7 (Although the mortality rate has thus far been 47 percent, the "case fatality rate — the likelihood that any given patient will die of AIDS — is 100 percent.") *Id.* at 6.

and housing."[58] The characteristics of the disease, compounded by the reaction of society, clearly complicate the judicial process in AIDS-related lawsuits. The intricacy of the situation was aptly described in a recent discussion of transfusion transmission liability:

> Despite common law precedents governing contaminated blood, there is no predetermined common law rule or formula that can be applied per se to AIDS lawsuits with a reasonably clear result. The AIDS issue is framed in medical, ethical, and political considerations and questions. It involves the politics of multiple advocacies.[59]

Rasmussen, one of the first published cases addressing AIDS,[60] presents one court's approach to the multifaceted issues the disease presents.

III. *South Florida Blood Service, Inc. v. Rasmussen*

Donald Rasmussen, while sitting on a bus bench, was struck and seriously injured by a hit and run driver who was leaving the scene of a prior accident.[61] Thereafter, Rasmussen was hospitalized for his injuries. In the course of medical treatment, he received fifty-one units of blood.[62] Subsequently, Rasmussen was diagnosed as having AIDS, which, "in all medical probability," was contracted through one of the transfusions necessitated by his injuries.[63] That disease ultimately caused his death.[64]

In the suit against the hit and run driver, Rasmussen[65] sought to discover the names and addresses of the blood donors in order to prove aggravation of injuries.[66] Served with a subpoena duces tecum,[67] non-party South Florida Blood Service, Inc. (South Florida), the blood supplier, refused to comply with discovery. Thereafter, South Florida moved to quash the subpoena, or for a protective order, claiming that

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[58]467 So. 2d at 800.

[59]Miller, *supra* note 23, at 3419-20.

[60]In the first published decision addressing AIDS, LaRocca v. Dalsheim, 120 Misc. 2d 697, 467 N.Y.S.2d 302 (N.Y. Sup. Ct. 1983), the court held that removal of AIDS victims from the prison was not justified because precautions were taken to prevent transmission of the disease to other prisoners.

[61]Appellant's Brief, *supra* note 12, at 4.

[62]*Rasmussen*, 467 So. 2d at 800.

[63]*Id.* at 801 n.6.

[64]Appellant's Brief, *supra* note 12, at 4.

[65]Although the plaintiff was deceased at the time of the *Rasmussen* decision, the court referred to the party seeking discovery as Rasmussen. For clarity, the same reference will be used in this Note. *See Rasmussen*, 467 So. 2d at 800 n.2.

[66]*Id.* at 800.

[67]*Id.* Rasmussen requested "any and all records, documents and other material indicating the names and addresses of the blood donors" whose blood Rasmussen received. *Id.*

Rasmussen had shown neither good cause nor justifiable reason for the release of the "confidential" information.[68] The trial court denied the motion, and a petition for certiorari followed.[69]

The Florida Court of Appeals initially recognized Florida's liberal discovery rules which allow for the discovery of any non-privileged matter which is relevant to the lawsuit.[70] The court further noted that it had the power, pursuant to the rules of discovery, and on the showing of good cause, to limit or prohibit discovery which would cause embarrassment, oppression, harassment, or undue invasion of privacy.[71] "In deciding whether good cause has been shown," the court stated, "it is necessary to balance the competing interests that would be served by the granting or denying of discovery."[72] The court identified the relevant interests as: (1) the plaintiff's interest in pursuing meaningful discovery to receive full compensation for his injuries; (2) the donors' interest in maintaining their constitutional right to privacy in the nondisclosure of personal matters; and (3) the societal and institutional interest in maintaining an adequate and healthy national blood supply.[73]

Ultimately, the *Rasmussen* court decided that the interests of the donors, the blood organizations, and society combined to outweigh the plaintiff's interest in pursuing meaningful discovery.[74] The details of the majority's reasoning in *Rasmussen* will be discussed in the following analysis of whether the issue was properly decided.

IV. The Balancing of the Interests

A. The Plaintiff's Interest: Aggravation of Injuries

The plaintiff's interest in a case like *Rasmussen*, proving aggravation of injuries[75] is the most evident and undisputed interest involved. In fact, it is the only interest upon which the court's decision will have an unequivocal result. If discovery is denied, the plaintiff can proceed no further in his pursuit of meaningful discovery. The effect of such a premature halt in discovery will leave the plaintiff unable to prove causation or refute the defendant's claim that the disease was contracted through other means.[76]

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[68] *Id.*

[69] *Id.*

[70] *Id.* at 801. ("Florida Rule of Civil Procedure 1.280 allows for discovery of any matter, not privileged, that is relevant to the subject matter of the action.").

[71] *Id.*

[72] *Id.*

[73] *Id.* at 801-04.

[74] *Id.* at 804.

[75] *See supra* note 5.

[76] Appellant's Brief, *supra* note 12, at 2. It stated:

Rasmussen's need for the discovery is absolute. Defendants below are vigorously attempting to prove an alternative source of Rasmussen's affliction. They have

It has long been a precept of tort law that a tortfeasor may be held liable for foreseeable aggravation of the injuries that he caused.[77] This doctrine operates to hold the tortfeasor liable for negligent medical treatment of the plaintiff's injuries.[78] According to Prosser, "Where the injured plaintiff subsequently contracts a disease, similar principles are applied. If the injury renders the plaintiff particularly susceptible to the disease, . . . there is little difficulty in holding the defendant [liable] for the consequences of the disease and its treatment."[79] Therefore, a plaintiff such as Rasmussen has the right to recover fully for the actions of the tortfeasor, including recovery for the development of AIDS which caused his death, if and only if he can prove that he contracted the disease through the blood necessitated by his injuries.[80]

Such a plaintiff also has the right to discover "any matter, not privileged, that is relevant to the subject matter of the action."[81] Because the most predictable defense to an aggravation of injury claim would be to assert that the plaintiff acquired the disease through another source,[82] the plaintiff must obtain discovery of the donors' identities in order to refute that defense. Thus, the plaintiff's need for the information is two-fold: it is necessary to prove one element of his prima facie case, causation, and to defeat the defense of infection from an alternate source.

> attempted to show him to be an intravenous drug abuser and homosexual. They also rely heavily on the South Florida Blood Service's voluntary statement of "fact" that none of Rasmussen's donors have become victims of AIDS. Plaintiff's primary source of contrary evidence begins with the discovery of the names and addresses of his donors.

Id. This portion of the appellant's brief was stricken because the Florida Court of Appeals had not considered the information. Telephone conversation with George Bender, attorney for Rasmussen, April 25, 1986.

[77]W. KEETON, D. DOBBS, R. KEETON & D. OWEN, PROSSER AND KEETON ON TORTS 309-10 (5th ed. 1984).

[78]*Id.*

[79]*Id.*

[80]Appellant's Brief, *supra* note 12, at 6 ("Full recovery for Rasmussen's death against the defendants below will . . . turn on the answer to a single question: What was the source of Rasmussen's AIDS?").

[81]FLA. R. CIV. P. 1.280. The Florida discovery rule is similar to the federal rule. *See* FED. R. CIV. P. 26(b).

[82]*See Rasmussen*, 467 So. 2d at 805 (Schwartz, C.J., dissenting), wherein the dissent maintained:

> Treating first the *plaintiff's* interest in securing the information in question, it must be emphasized — although the court does not mention the fact — that the defendant below apparently on the ground that Rasmussen may himself have been a member of a "high risk" group, severely contests the fact that he acquired AIDS in the blood transfusion process. Thus, far from a matter of purely tangential concern . . . it is of absolute necessity to his and his survivors' right and ability to recover that they secure information that one or more of the donors is suffering from or is a potential carrier of the lethal affliction.

(footnote omitted).

The plaintiff's interest in discovery, briefly discussed in *Rasmussen*, was conceded to be "legitimate."[83] However, the court stated that the weight of the plaintiff's interest was tempered by the possibility that any evidence discovered would have "questionable" probative force.[84] The court based this conclusion on two facts: first, according to South Florida, none of the donors had been diagnosed as having AIDS, and second, even if the donors, or one of them, was determined to be at high risk to develop AIDS, that fact would not confirm that one of them had transmitted the disease.[85]

The court's reasoning illustrates why the disease process itself must be thoroughly understood before the legal issues arising therefrom can be appreciated. It is well established that a person may carry and transmit the AIDS virus without ever developing the disease.[86] It is further known that a person exposed to AIDS may develop the disease many years after exposure.[87] The "fact" that none of the donors has been diagnosed as having AIDS is, therefore, of tenuous probative value. Moreover, if medical science accepts and asserts the fact that certain groups of individuals are more likely than not to develop AIDS,[88] the establishment of the fact that one or more donors had characteristics indicative of these high-risk groups does have probative value. There is, of course, no doubt as to the probative force of discovering that one of the donors had AIDS or died therefrom, a possibility not considered by the *Rasmussen* court.

In concluding its discussion of the plaintiff's interest, the *Rasmussen* court stated, "[s]ince the probative value of the evidence which might be discovered is questionable, Rasmussen's interest in the information is slight when compared with the opposing interests which we now discuss."[89] The significance of Rasmussen's interest, therefore, was discounted from the outset of the balancing test.

B. The Societal and Institutional Interest in Maintaining an Adequate and Healthy National Blood Supply

South Florida, which asserted the interests of the blood organizations, the donors, and society, contended that the precedential effect of *Rasmussen*, should discovery be allowed, would compromise the national blood supply.[90] This argument, based in part on a series of predictions,

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[83] 467 So. 2d at 801.

[84] *Id.*

[85] *Id.*

[86] *Id.* at 805 n.1 (Schwartz, C.J., dissenting).

[87] *See* Krim, *supra* note 3, at 5.

[88] *See* Goldsmith, *supra* note 1, at 3369 (homosexual and bisexual men, hemophiliacs, and intravenous drug abusers are at high risk to develop AIDS).

[89] 467 So. 2d at 801.

[90] *Id.* at 804.

proceeded as follows. Initially, South Florida asserted that the twin aims of all national blood suppliers — providing blood which is both adequate in amount and free from disease — depends on the maintenance of an all volunteer donation system.[91] Such a system, which the National Blood Policy advocates,[92] provides blood less likely to be contaminated with infectious disease than that which is received from paid donors. Because the majority of AIDS victims are homosexuals or intravenous drug abusers, and because the plaintiff sought to show that one of the donors had AIDS at the time of donation or was at high risk to develop the disease, South Florida assumed that the plaintiff's only possible use of the information would necessarily entail probing into the intimate details of the donors' lives.[93] The fear of such intrusive questioning, South Florida predicted, would inhibit prospective donors from donating blood and, therefore, compromise the national blood supply.[94]

South Florida was not alone in its assertion. The Council of Community Blood Centers (CCBC), "a national association of independent, non-profit regional and community blood centers operating in 33 states across the nation,"[95] and the American Blood Commission (ABC), "a non-governmental organization established to help assure all the people of the nation of a safe and adequate supply of blood and blood components,"[96] joined South Florida as amicus curiae opponents to discovery in the *Rasmussen* case.[97] An historical perspective of the national blood organizations lends clarity to their position in a case like *Rasmussen*.

In 1975, the federal government voiced its concern for the establishment and maintenance of a safe and adequate national blood supply by issuing the National Blood Policy (NBP).[98] It encouraged an all-voluntary donation system in order to meet the policy goals of quality, accessibility, efficiency, and maintenance of an adequate blood supply.[99] Despite the fact that the NBP was never enacted, it "became the focal point around which blood banking policy has evolved over the last decade."[100]

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[91] *Id.*

[92] *Id.*

[93] *See infra* note 213.

[94] 467 So. 2d at 804.

[95] Brief for Amicus Curiae Appellee Council of Community Blood Centers at 5, South Florida Blood Service, Inc. v. Rasmussen, 467 So. 2d 798 (Fla. Dist. Ct. App. 1985) [hereinafter cited as Brief for CCBC]. *See also Rasmussen*, 467 So. 2d at 801.

[96] *See* Brief for Amicus Curiae Appellee American Blood Commission at 1, Rasmussen v. South Florida Blood Service, Inc., No. 84-1403 (filed Aug., 1985) [hereinafter cited as Brief for ABC].

[97] The ABC joined as amicus curiae appellee on the appeal to the Florida Supreme Court.

[98] O.T.A., *supra* note 44, at 3.

[99] *Id.*

[100] *Id.*

Originally formed to implement the NBP,[101] the ABC has coordinated the endeavors of the nation's three major blood suppliers:[102] the American Red Cross (ARC), the CCBC, and the American Association of Blood Banks (AABB).[103] Through the efforts of these blood organizations and the ABC, the voluntarily-donated portion of the national blood supply increased from 89 percent in 1971 to 97.8 percent in 1980.[104] Because donated blood has less chance of infection with disease than blood that is purchased,[105] the result of this increase in voluntary donations is a healthier blood supply.

With the advent of AIDS, the blood organizations face a new issue: the impact that the disease will have on the collection and use of blood and blood products.[106] A 1985 Blood Policy and Technology Report recognized this as a pressing issue.[107] This report also recognized a related issue: "[S]hould the names of AIDS patients be made available, to what extent, and to whom?"[108]

It is precisely these two issues which will surface in cases like *Rasmussen*. South Florida, the ABC, and the CCBC urged that the release of the donors' names be disallowed in order to prevent endangering the national blood supply.[109] They cited their efforts of the past ten years in the development of a nearly all-voluntary donation system and asserted that allowing discovery would decrease such donations.[110] The organizations further noted the general reluctance of individuals to donate blood, despite the fact that the donation process involves no more than approximately forty-five minutes.[111] The reluctance to donate has traditionally been attributed to fear — of the needle, of pain, and of unspecified consequences.[112] Currently, because of a lack of public awareness, many people refuse to donate on the erroneous assumption that they may contract AIDS through donation alone.[113] The organizations contended that to add the fear of later identification and questioning to

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[101] *Id.*

[102] *Id.* at 3-4.

[103] *Id.*

[104] *Id.* at 5.

[105] *See Rasmussen*, 467 So. 2d at 804.

[106] O.T.A., *supra* note 44, at 12.

[107] *Id.* at 1.

[108] *Id.* at 16.

[109] *Rasmussen*, 467 So. 2d at 804; Brief for ABC, *supra* note 96, at 3; Brief for CCBC, *supra* note 95, at 5; Brief for Appellee South Florida Blood Service at 6, South Florida Blood Service, Inc. v. Rasmussen, 467 So. 2d 798 (Fla. Dist. Ct. App. 1985) [hereinafter cited as Brief for SFBS].

[110] *See supra* note 109.

[111] Brief for CCBC, *supra* note 95, at 7.

[112] *Id.* at 19.

[113] *Id.* at 17.

this multitude of public concerns would inhibit prospective donors to the point of depleting the voluntary sector of the blood supply.[114]

Notwithstanding the merit of this argument at the time of the appellate court decision in *Rasmussen*, its current force, in light of the development of a highly accurate test for the detection of the AIDS antibody in donated blood, is virtually insignificant. The HTLV-III test for AIDS antibodies was declared 99.8 percent accurate after five months of use.[115] Such a high degree of accuracy means, in effect, that *at least* 99.8 percent of the AIDS-contaminated blood will be diverted from the national bloodstream *at the time of donation*. The threat of later questioning by a plaintiff like Rasmussen, therefore, will be virtually nonexistent.

Arguably, the blood organizations could assert that donors may fear that they will fall into the 0.2 percent of AIDS-infected blood which may slip through the system undetected. However, this is a balancing process which the courts must undertake; remoteness of degree is properly assessed in such a process.[116] The minute possibility of later questioning must be outweighed by the plaintiff's unequivocal need for discovery.

C. The Donors' Interest: The Constitutional Right to Privacy

In *Rasmussen*, South Florida, the CCBC, and the ABC asserted that blood donor records are protected by the constitutional right to privacy in the nondisclosure of personal matters.[117] They further asserted that the release of the donors' identities, coupled with the anticipated use of the information, could only lead to a violation of the donors' right to privacy.[118]

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[114]Brief for ABC, *supra* note 96, at 3; Brief for CCBC, *supra* note 95, at 16-20; Brief for SFBS, *supra* note 109, at 6.

[115]*See* Marwick, *supra* note 14, at 1681-83. In a recent meeting of the National Institutes of Health, the Food and Drug Administration, and the Centers for Disease Control, the implications of the HTLV-III test were discussed. As one CDC official stated:

> [The findings of studies] clearly demonstrate the screening test is valid for antibody. We have found that in a group of blood donors — persons at low risk of HTLV-III exposure and with a low prevalence of infection — and in a group of gay men who are at high risk of HTLV-III exposure and with a high prevalence of infection with HTLV-III, that the test is highly specific. It correctly identifies those in both groups who had a high probability of infection.

Id. at 1683. Noted as a "tremendous accomplishment" in the halt of transfusion transmission of AIDS, the test has gained the support of the leading national health agencies and blood organizations. *Id.*

[116]*See infra* notes 153-58 and accompanying text.

[117]*See Rasmussen*, 467 So. 2d at 801. *See also* Brief for ABC, *supra* note 95, at 13-7.

[118]*See* Brief for ABC, *supra* note 96, at 7; Brief for CCBC, *supra* note 95, at 13-14; Brief for SFBS, *supra* note 109, at 6. It should be noted that South Florida did not feel constrained to protect the rights of its donors when it released to the defendants in

The *Rasmussen* court initially identified two recognized zones of privacy:[119] (1) the zone encompassing the right to autonomous decision making, typified by cases such as *Roe v. Wade*[120] and its progeny; and (2) the zone encompassing "the interest in avoiding disclosure of personal matters," recognized in cases such as *Whalen v. Roe*.[121] Immediately looking to Rasmussen's potential use of the donors' identities, the court stated:

> It is evident Rasmussen needs more than just the names and addresses of the donors. His interest is in establishing that one or more of the donors has AIDS or is in a high risk group. Because the groups at highest risk are homosexuals, bisexuals, intravenous drug users and hemophiliacs, it is obvious that Rasmussen would have to probe into the most intimate details of the donors' lives, including their sexual practices, drug use and medical histories. Both the courts and the legislature have recognized these areas as sanctuaries of privacy entitled to protection.[122]

Ultimately, the court concluded that Rasmussen's anticipated use of the information, along with the potential "oppressive effects of possible disclosure outside the litigation," amounted to an interest falling within the disclosural right to privacy.[123]

Thereafter, the *Rasmussen* court adopted a balancing test as the appropriate means by which to assess the competing interests of the donors' privacy and the state's interest "in fair and efficient resolution of disputes."[124] The weight of the state's interest, the court explained,

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Rasmussen the identities of individuals who donated blood to the plaintiff following his initial hospitalization. *See* Appellant's Brief, *supra* note 12, at 2.

> Donors' names and addresses have been produced in the past by blood banks in Florida and the South Florida Blood Service in particular. In this very litigation blood banks, *including the South Florida Blood Service* have produced to defendants below names and addresses of donors of blood received by Rasmussen without objection.

Id. This portion of the appellant's brief was stricken because the Florida Court of Appeals had not considered the information. Telephone conversation with George Bender, attorney for Rasmussen, April 25, 1986.

The doctrine of waiver, which is beyond the scope of this Note, may apply in cases like *Rasmussen* where the blood bank has released its donor records to other litigants. *E.g., In re* Continental Illinois Securities Litigation, 732 F.2d 1302, 1314 (7th Cir. 1984) ("protection from disclosure is available only when the party asserting a privilege has maintained confidentiality") (footnote omitted).

[119]467 So. 2d at 802.

[120]410 U.S. 113 (1973).

[121]429 U.S. 589 (1977).

[122]*Rasmussen*, 467 So. 2d at 802. *But see* Miller, *supra* note 23, at 3421 (The American Red Cross questions blood donors about the use of intravenous drugs.).

[123]*Rasmussen*, 467 So. 2d at 802.

[124]*Id.* at 803.

is proportional to the relevancy and necessity of the requested information to the disposition of the lawsuit.[125] Despite Florida's liberal discovery policy and the fact that the information was relevant and vital to the resolution of Rasmussen's wrongful death claim, the court held that the donors' privacy rights, combined with the societal and institutional interest in maintaining "the free flow of donated blood," outweighed the interests of Rasmussen and the state.[126]

1. Judicial Interpretation of the Constitutional Right to Privacy. — Although there is no express constitutional right to privacy,[127] the Supreme Court has identified a right to privacy in relation to explicit and implied constitutional guarantees. Some of the explicit guarantees which have been interpreted to give rise to a right to privacy include privacy in one's associations as guaranteed by the first amendment,[128] privacy in relation to unrestricted reading in one's home as guaranteed by the first and fourteenth amendments,[129] and privacy as guaranteed by the fourth amendment's prohibition against unreasonable searches and seizures.[130]

The Supreme Court initially identified an implied right to privacy in *Griswold v. Connecticut*.[131] In that case, the Court recognized a privacy right for which no specific constitutional guarantee existed — the right of married persons to use contraceptives. The right to privacy in marital decisions involving contraception, the Court explained, emanates from the "penumbras" surrounding the specific guarantees in the Bill of Rights.[132] More simply stated, "various guarantees create zones of privacy."[133] Because the marital association concerns a relationship lying within the zone of privacy created by several fundamental constitutional guarantees, the Court held the Connecticut statute, which invaded that privacy zone, unconstitutional.[134]

Since *Griswold*, the parameters of the right to privacy have been tested:

> [From the time of *Griswold*] American constitutional lawyers and scholars have been probing for the shape and boundaries of that evanescent and floating notion: privacy. The protections comprehended by that term have been variously grounded in the First, Third, Fourth, Fifth, Ninth and Fourteenth Amendments.

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[125] *Id.*
[126] *Id.* at 804.
[127] *See* Whalen v. Roe, 429 U.S. at 607 (Stewart, J., concurring).
[128] *See* NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449 (1958).
[129] Stanley v. Georgia, 394 U.S. 557 (1969).
[130] Katz v. United States, 389 U.S. 348 (1967).
[131] 381 U.S. 479 (1965).
[132] *Id.* at 484.
[133] *Id.*
[134] *Id.* at 485-86.

> While most recently these "rights of privacy" have found anchorage as a portion of liberty protected by the due process clauses, their precise scope remains uncertain, still in the stage of exploration.[135]

Although the parameters of the constitutional right to privacy remain obscure, its application has been limited to protecting only rights so personal that they are "fundamental" or "implicit in the concept of ordered liberty."[136] The Supreme Court has defined fundamental rights as those involving marital activities, procreation, family relationships, child rearing and education, and contraception.[137]

In *Rasmussen*, the plaintiff sought to discover only the names and addresses of the blood donors.[138] The court, looking immediately to the anticipated use of the requested information, held that blood donors' identities are protected by the disclosural right to privacy.[139] In order to balance more precisely the donors' rights against those of the plaintiff, however, it is necessary to recognize that the right to disclosural privacy asserted in *Rasmussen* is two dimensional. First, the right to nondisclosure of blood donors' names entails a right to anonymity. Second, the right to nondisclosure of the intimate details of one's sexual, medical, and drug use histories entails a right to keep intimate facts private. In order to obtain constitutional protection on either dimension, the requested information must constitute facts so personal that they are "implicit in the concept of ordered liberty."[140] The primary issue for resolution, then, is the scope of the disclosural right to privacy.

2. The Disclosural Right to Privacy. — Since its decision in *Griswold*, the Supreme Court has frequently alluded to the disclosural right to privacy without ruling on it.[141] For example, in *Planned Parenthood of Central Missouri v. Danforth*,[142] the Court sustained the validity of maintaining abortion records because they served a valid purpose and because there was no evidence that the information would be misapplied.[143] Similarly, in *Nixon v. Administrator of General Services*,[144] the

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[135]J. Torke, *Constitutional Law, Judicial Review and Private Morality* 2 (1983) (unpublished material).

[136]Roe v. Wade, 410 U.S. at 152 (quoting Palko v. Connecticut, 302 U.S. 319, 325 (1937)).

[137]*Id.*

[138]467 So. 2d at 801.

[139]*Id.* at 804.

[140]*See supra* note 136 and accompanying text.

[141]J. Nowak, R. Rotunda, & J. Young, Constitutional Law 761 n.22 (2d ed. 1983). *See also* Brief for Amicus Curiae Appellant Miami Herald Publishing Co. at 7, Rasmussen v. South Florida Blood Service, Inc., No. 67,081 (filed Aug. 1985) [hereinafter cited as Brief for Miami Herald].

[142]428 U.S. 52 (1976).

[143]*Id.*

[144]433 U.S. 426 (1977).

Court held that, even assuming a right to privacy existed, that right was outweighed by the national interest in archiving the presidential records.[145] A variety of state courts have followed suit in their interpretation of the disclosural right to privacy.[146]

The *Rasmussen* court relied upon *Whalen v. Roe* for the existence of the disclosural right to privacy.[147] In *Whalen*, the Supreme Court noted that the case law recognizes two types of privacy interests — nondisclosure of personal information and autonomy in decision making.[148] A closer look at *Whalen*, however, reveals that although the Court stated that in some circumstances "[the] duty . . . to avoid unwarranted disclosures [of data compiled for public purposes] . . . arguably has its roots in the Constitution," it did not reach the merits of the constitutional issue.[149]

In *Whalen*, the propriety of a New York statute requiring recordation of the identities of individuals receiving Schedule II drug prescriptions was challenged as violative of both the disclosural and decision-making privacy zones.[150] The appellant physicians and patients contended that the recording and storing of information concerning individuals' drug use "creates a genuine concern that the information will become publicly known and that it will adversely affect their reputations."[151] Such threat of reputational harm, the appellants asserted, would make physicians hesitant to prescribe needed drugs and patients hesitant to pursue health care.[152]

The Supreme Court, however, found no indication that the statute's security measures would not be enforced.[153] Although the Court recognized that the data could be exposed in litigation over improper prescribing, it rejected that basis for disqualification of the recording system.[154] Such a "remote possibility that judicial supervision of the

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[145] *Id.*

[146] *See, e.g.*, Chidester v. Needles, 353 N.W.2d 849, 853 (Iowa 1984) (patients' qualified privacy interest in their medical records must yield to the state's interest in the administration of criminal justice); Denoncourt v. Commonwealth, State Ethics Comm'n, 470 A.2d 945, 949 (Pa. 1983) ("government's intrusion into a person's private affairs is constitutionally justified when the government interest is significant and there is no alternate reasonable method of lesser instrusiveness") (footnotes omitted); *In re* June 1979 Allegheny County Investigating Grand Jury, 415 A.2d 73, 77 (Pa. 1980) (held that because the court could take necessary precautions to ensure confidentiality if the patient tissue reports were adduced at trial, production of those reports did not violate the federal or Pennsylvania constitutions). *See also infra* note 167.

[147] 467 So. 2d at 802.

[148] *Whalen*, 429 U.S. at 599.

[149] *Id.* at 605-06.

[150] *Id.* at 599-600.

[151] *Id.* at 600.

[152] *Id.*

[153] *Id.* at 600-01.

[154] *Id.* at 601-02.

evidentiary use of particular . . . information will provide inadequate protection against unwarranted disclosures," the Court stated, was insufficient to invalidate the program.[155] The fact that the information would, by definition, be disclosed to the Board of Health, the Court stated, was analogous to

> a host of other unpleasant invasions of privacy that are associated with many facets of health care . . . . [D]isclosures of private medical information to doctors, to hospital personnel, to insurance companies, and to public health agencies are often an essential part of modern medical practice even when the disclosure may reflect unfavorably on the character of the patient.[156]

Ultimately, the *Whalen* Court held that neither the instant nor the remote menace of unwarranted disclosure posed by the recording system was adequate to invalidate the statute on fourteenth amendment grounds.[157] The Court specifically reserved judgment on privacy issues related to the unauthorized exposure of collections of private data, whether or not the exposure was intentional.[158]

The Supreme Court also addressed the disclosural right to privacy in *Paul v. Davis*.[159] The plaintiff in *Paul* had been arrested for shoplifting. After publication and distribution of a police report labeling the plaintiff as a shoplifter, the charges were dropped. Davis filed suit under section 1983 of Title 42,[160] alleging a violation of rights guaranteed by the first, fourth, fifth, ninth, and fourteenth amendments.[161]

In its discussion of the plaintiff's claim of denial of due process, the Court described Davis' interest as one "in reputation alone."[162] Such an interest, the Court held, could not find protection in the Due Process Clause.[163] Specifically in relation to the multi-amendment privacy claim,

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[155] *Id.*

[156] *Id.* at 602.

[157] *Id.* at 603-04.

[158] *Id.* at 605-06.

> We are not unaware of the threat to privacy implicit in the accumulation of vast amounts of personal information in computerized data banks. . . . The collection of taxes, the distribution of welfare and social security benefits, the supervision of public health, the direction of our Armed Forces, and the enforcement of the criminal laws all require the orderly preservation of great quantities of information, much of which is personal in character and potentially embarrassing or harmful if disclosed. . . . [We] do not [today] decide any question which might be presented by the unwarranted disclosure of accumulated private data — whether intentional or unintentional . . . .

Id.

[159] 424 U.S. 693 (1976).

[160] 42 U.S.C. § 1983 (1982).

[161] 424 U.S. at 694.

[162] *Id.* at 711-12.

[163] *Id.* at 712.

the Court noted that a reputational interest was far removed from the areas it considered entitled to privacy.[164] The Court stated:

> [Davis] claims constitutional protection against the disclosure of the fact of his arrest on a shoplifting charge. His claim is [not] based upon any challenge to the state's ability to restrict his freedom of action in a sphere contended to be "private" . . . . None of our substantive privacy decisions hold this or anything like this, and we decline to enlarge them in this manner.[165]

Because the personal privacy right claimed by the plaintiff was not "implicit in the concept of ordered liberty," the Court denied it constitutional protection.[166]

Because the Supreme Court has recognized the disclosural right to privacy but never upheld it, the boundaries of that right remain obscure. As stated by Justice Stewart in his *Whalen* concurrence, the Constitution provides no general right to privacy.[167] The protection of the right to be "left alone," the Justice stated, remains with the states.[168]

3. The Right to Anonymity. — As stated previously, the interest in nondisclosure of only the blood donors' identities is essentially an interest in anonymity. The Supreme Court has not addressed the precise issue of whether the disclosure of identity alone may be constitutionally prohibited.[169] Applying the Supreme Court's general test for privacy, however, the donors' names and addresses are protected from disclosure

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[164] *Id.*

[165] *Id.* at 713.

[166] *Id.*

[167] 429 U.S. at 607 (Stewart, J., concurring). It is interesting to note that in 1984, the Florida Supreme Court stated that "there is . . . no per se federal constitutional right to disclosural privacy." *Rasmussen* did not discuss this case. *See* Forsberg v. Hous. Auth., 455 So. 2d 373, 374 (Fla. 1984) (per curiam).

[168] *Whalen*, 429 U.S. at 608 (Stewart, J., concurring).

[169] A variety of lower federal courts have addressed the issue of whether individuals' identities alone may be disclosed. *See, e.g.*, Payne v. Howard, 75 F.R.D. 465 (D.D.C. 1977) (defendant dentist ordered to release names of nonparty former patients to plaintiff so that the plaintiff could obtain the former patients' consent to release of their medical records); Lincoln American Corp. v. Bryden, 375 F. Supp. 109 (D. Kan. 1973) (plaintiff's interest in discovering stockholders' names outweighed legislative policy of maintaining the confidentiality of stockholder lists because the information was relevant to the plaintiffs' claims and the court used its discretionary power to limit the scope of the plaintiffs' discovery); Connell v. Washington Hosp. Center, 50 F.R.D. 360 (D.D.C. 1970) (despite the defendant/hospital's contention that release of nonparty former patients' names could lead to disclosures that the patients were treated for venereal disease or sexual aberrations, the plaintiffs were entitled to discover the former patients' identities for three reasons: (1) the plaintiffs needed the testimony of former patients to proceed in their negligence suits; (2) the hospital had an undue advantage because it could contact former patients to help defend the lawsuits; and (3) the names disclosed in discovery were protected by an absolute privilege).

only if that information implicates "fundamental" rights.[170] Because one's name is far removed from the personal areas defined as fundamental,[171] it is unlikely that any court would invoke the Constitution to protect merely the identities of voluntary blood donors.

Aside from the privacy decisions of the United States Supreme Court, the opponents to discovery in *Rasmussen* argued that "in tissue donation cases, the donor's right to privacy has been found to extend to the donor's identity."[172] *Head v. Colloton*,[173] the only reported case addressing the issue of whether a donor's identity may be discovered, at first glance appears to support nondiscovery in a case such as *Rasmussen*. However, that case and its holding must be limited to its specific fact situation.

In *Head*, the plaintiff sought to discover the name of a woman who had undergone compatibility testing to donate bone marrow to a member of her family. Without the donor's consent or knowledge, the hospital placed her name on its registry of potential donors for use in an experimental donation program. Thereafter, the plaintiff learned of the donor's existence and sought to discover her name in order to solicit a donation for his own use. After the donor informed the hospital that she was not interested in making a donation, the plaintiff sought to compel discovery so that he could personally pursue the matter.[174] The court denied discovery.[175]

On these facts alone, this situation differs greatly from one where a plaintiff has received the blood of a voluntary donor and has died as a result. Moreover, the *Head* court was referring to a potential donor, whom the plaintiff, a member of the general public, wished to contact to solicit a bone marrow donation.[176] In a case like Rasmussen's, the link is much closer than that between a potential donor who does not wish to donate and an unknown member of the general public; one of the donors in Rasmussen's case has voluntarily donated his or her blood, which, "in all medical probability," passed to the plaintiff the disease which ended his life.[177]

Aside from the disparity in facts, the *Head* case was decided solely on state statutory grounds.[178] Although the *Head* court noted the con-

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[170]*See supra* text accompanying notes 136-37.

[171]*Id.*

[172]Brief for CCBC, *supra* note 95, at 13 (citing Head v. Colloton, 331 N.W.2d 870 (Iowa 1983)).

[173]331 N.W.2d at 870.

[174]*Id.* at 873.

[175]*Id.* at 877.

[176]*Id.* at 873.

[177]*See supra* text accompanying note 63.

[178]Discovery was denied on the basis of Iowa's public records statute. 331 N.W.2d at 876 (citing IOWA CODE § 68A.7(2) (1973)).

stitutional right to privacy and stated that the right could be as "important to a potential donor as to a person in ill health,"[179] its decision was not constitutionally based. When viewed in light of its specific facts and holding, the *Head* case offers little guidance to a court considering the claim of a blood donor's constitutional right to remain anonymous.[180]

4. The Right to Nondisclosure of Personal Information. — In *Rasmussen*, the court concluded that information concerning one's sexual, medical, and drug use histories falls within "sanctuaries of privacy entitled to protection."[181] On this basis, and on the possibility that disclosure outside of the litigation could lead to donor discrimination and embarrassment, the court held that the donors' identities were protected by the disclosural right to privacy.[182] To support its holding that personal information regarding sexual and drug use histories is privileged, the *Rasmussen* court cited three federal court decisions: *Priest v. Rotary*,[183] *Lampshire v. Procter & Gamble Co.*,[184] and *Plante v. Gonzalez*.[185]

In *Priest*, the plaintiff alleged employment discrimination in the form of sexual harassment.[186] In order to support his defense that the plaintiff was attempting to "pick up" male customers while on duty, the employer-defendant sought to discover the identities of the plaintiff's sexual partners for the previous ten years.[187] Through this information, the defendant hoped to reveal evidence of habit, motive, or intent, which would be admissible under exceptions to the rule prohibiting the use of character evidence.[188] The *Priest* court denied discovery for three reasons. First, despite the defendant's contentions to the contrary, the information was

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[179]331 N.W.2d at 876.

[180]In Bishop Clarkson Memorial Hosp. v. Reserve Life Ins. Co., 350 F.2d 1006 (8th Cir. 1965), the court addressed the question whether a hospital could withhold records of patient-policyholders from an insurance company when the patients had consented to the inspection. The court held that the hospital could not withhold the records. This decision was based in part on the fact that because Nebraska law required hospitals to maintain patient records, the records were "quasi-public." "[Quasi-public] records . . . may be inspected by any person having an 'interest such as would enable him to maintain or defend an action for which the . . . record sought can furnish evidence or necessary information.' " *Id.* at 1011 (quoting Pyramid Life Ins. Co. v. Masonic Hosp. Ass'n of Payne County, Okla., 191 F. Supp. 51, 54 (W.D. Okla. 1961)). *Accord* Connell v. Washington Hosp. Center, 50 F.R.D. 360 (D.D.C. 1970). Blood donor records may be obtainable as "quasi-public" records because blood banks are required by federal law to maintain donor records. *See* Add'l Standards for Human Blood and Blood Products, 21 C.F.R. 640.4(e), 640.64(d), 640.72(a)(2) (1985).

[181]467 So. 2d at 802.

[182]*Id.* at 804.

[183]98 F.R.D. 755 (N.D. Cal. 1983).

[184]94 F.R.D. 58 (N.D. Ga. 1982).

[185]575 F.2d 1119 (5th Cir. 1978).

[186]*Priest*, 98 F.R.D. at 756.

[187]*Id.*

[188]*Id.* at 758 (citing FED. R. EVID. 404, 406).

sought to prove that the plaintiff acted in conformity with past behavior.[189] Second, the probative value of the information was marginal.[190] Third, the discovery may have been pursued with the intent to discourage the plaintiff from prosecuting her Title VII[191] lawsuit.[192] In a case like *Rasmussen*, none of the *Priest* bases for denying discovery is present. The information is extremely relevant to the proposition that the plaintiff contracted AIDS through a blood transfusion,[193] the use of the information is not proscribed by the procedural rules, and the plaintiff has no ulterior motive to inhibit a lawsuit. Furthermore, the evidence sought to be discovered would not be offered to impinge the character of the blood organization or the blood donors.

In *Lampshire*, also relied upon by the *Rasmussen* majority, the plaintiff intended to support her products liability claim with the results of a CDC study on Toxic Shock Syndrome (TSS).[194] The defendant opposed the use of the TSS report and sought additional information about the study. Although the CDC agreed to release all relevant documents, it refused to include identification of the women involved in the study.[195] On consideration of the protective order requested by the CDC, the court noted that the TSS report contained personal information concerning women who were in no way related to the lawsuit.[196] From the affidavits presented by both parties, the court concluded that "the validity of the CDC studies can be addressed without actually contacting the subjects."[197] Because the defendant had not shown that the identities of the women were relevant to disputing the validity of the study, the court granted the protective order.[198] In Rasmussen's case, by comparison, the identification of the donors is clearly relevant to proving the aggravation of injury claim. The plaintiff does not wish to use the information to prove a statistical probability that he contracted AIDS through a blood transfusion; he already has medical testimony to that effect.[199] Rasmussen's need, the same as any plaintiff in his position, is to identify the donors to establish the causal link between the development of AIDS and a specific donor(s) whose blood he received.[200] Furthermore, the donors in *Rasmussen* were not totally removed from

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[189] *Priest*, 98 F.R.D. at 760.
[190] *Id.* at 761.
[191] 42 U.S.C. §§ 2000e–2000e-17 (1982).
[192] *Priest*, 98 F.R.D. at 761-62
[193] *See supra* notes 80-82 and accompanying text.
[194] *Lampshire*, 94 F.R.D. at 59.
[195] *Id.*
[196] *Id.* at 60.
[197] *Id.*
[198] *Id.* at 60-61.
[199] *See supra* text accompanying note 63.
[200] *See supra* note 82.

the circumstances that culminated in the lawsuit. Each of them donated blood that the plaintiff received. One or more of them, "in all medical probability," passed to the plaintiff the disease that caused his death.[201]

In *Plante*, the Fifth Circuit Court of Appeals appraised the validity of financial disclosures required by Florida's Sunshine Amendment.[202] The amendment, which required *public* disclosure of the financial status of *public* officials, was enacted following "political scandals" involving Florida officials.[203] Faced with the narrow issue of financial privacy, the *Plante* court held that the interests of the public outweighed the opposing confidentiality interests.[204] A case like *Rasmussen* involves issues distinct from those of *Plante*. The issue is not the financial privacy of public officials. Moreover, no public disclosure of the data is required. Indeed, the *Plante* court, like the Supreme Court in *Whalen*, recognized the disclosural privacy right but did not, by its ruling, define the scope of that right.[205]

On the basis of these three decisions, it is entirely unclear whether information concerning a blood donor's drug use, medical, or sexual histories would be entitled to constitutional protection. On the basis of the Supreme Court's privacy decisions, however, it is unlikely that such information would find protection in the Constitution.[206] The Court has narrowly limited the invocation of the right to privacy to areas "implicit in the concept of ordered liberty."[207] Moreover, although the Court has recognized the disclosural right to privacy, it has never upheld that right.

The *Rasmussen* case presents competing interests similar to those in situations the Supreme Court has addressed.[208] As in *Whalen*,[209] the threat of injury to reputation is remote. *If* the court ordered protective

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[201] *See supra* note 63 and accompanying text.

[202] 575 F.2d at 1119, 1122 (citing FLA. STAT. ANN. § 112.3145 (West Supp. 1978)).

[203] *Plante*, 575 F.2d at 1122.

[204] *Id.* at 1137-38.

[205] *Id.* at 1132-35.

[206] One amicus opponent to discovery in *Rasmussen* cited Whisenhunt v. Sprodlin, 104 S. Ct. 404 (1983), as authority for the statement that the Supreme Court "specifically held that the constitutional right to freedom from public intrusion encompasses sexual conduct between consenting adults." Brief for CCBC, *supra* note 95, at 11. In *Whisenhunt*, however, certiorari was denied. The dissenters to the denial expressed their view that because fundamental rights were implicated, "the notice requirement of the Due Process Clause demands particular precision in this case." *Whisenhunt*, 104 S. Ct. at 409 (Brennan, Marshall, Blackmun, J.J., dissenting).

[207] *See supra* notes 136-37 and accompanying text.

[208] In the only reported case of AIDS victims claiming constitutional protection, a New York court held that the Equal Protection Clause did not apply to prisoners with AIDS because that clause "requires that similarly situated people be treated equally. . . . AIDS victims are not similarly situated." Cordero v. Coughlin, 607 F. Supp. 9 (S.D.N.Y. 1984) (mem.).

[209] *See supra* notes 148-58 and accompanying text.

discovery measures,[210] and *if* the measures were breached, word of the donor's *possible* affiliation with AIDS *could* leak to the public. Whether such a far removed and hypothetical result would find protection in the Constitution, in the face of the vital state interest of promoting fair and efficient litigation, is doubtful.[211]

Similar to the plaintiff in *Paul*,[212] the donors in a case like *Rasmussen* may suffer injury from the disclosure of facts affecting their reputations. However, the Supreme Court in *Paul* flatly refused to recognize one's reputation as the basis for constitutional protection. In fact, the Court denied relief despite the fact that the potentially damaging information had been disclosed in published form, and that the person facing potential injury *himself* asserted the claim.[213] *Rasmussen* is distinguishable from *Paul* on several points. Initially, a court may regard information concerning a blood donor's medical, drug use, and sexual histories as more "intimate" than information concerning one's police record.[214] On this basis alone, a court may consider a blood donor's reputational interest greater than the interest asserted in *Paul*. However, the remaining distinctions between *Paul* and *Rasmussen* indicate that discovery should be allowed. In *Rasmussen*, for example, only the potential for disclosure of personal information exists.[215] Furthermore, public disclosure of even the donors' identities is not required and discovery would be subject to judicial control.[216] In addition, the blood donors' constitutional rights

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[210]Federal courts' discretion in issuing protective orders is almost unlimited. Federal Rule 26(c) allows the court to "*make any order which justice requires* to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense." FED. R. CIV. P. 26(c) (emphasis supplied).

[211]"The purpose of discovery is to provide a mechanism for making relevant information available to the litigants. 'Mutual knowledge of all the relevant facts gathered by both parties is essential to proper litigation.' Hickman v. Taylor, 329 U.S. 495, 507 (1974)." FED. R. CIV. P. 26 advisory committee note.

[212]*See supra* notes 159-66.

[213]*Paul*, 424 U.S. at 712.

[214]*See* United States v. Westinghouse Electric Corp., 638 F.2d 570, 577 (3d Cir. 1980) ("Information about one's body and state of health is matter which the individual is ordinarily entitled to retain within the 'private enclave where he may lead a private life.' ").

[215]*See* Brief for Miami Herald, *supra* note 141, at 20-21. It argued:

> There may, in fact, be no need for any such probing discovery. Upon receipt of the list of names, Rasmussen may discover that one or more of the donors have died from or are suffering from AIDS by simply checking the names against public death records or other records maintained by the Center for Disease Control, United States Department of Health and Human Services. He may discover all are perfectly healthy. Those on the list with AIDS, or who may themselves be in a "high risk" group, may be willing to disclose this fact under the circumstances of this case, or, as Judge Schwartz suggests, there may be donors who are ill, but do not know they may be suffering from AIDS. Any such individuals might find Rasmussen's discovery beneficial.

Id.

[216]*See supra* note 210.

are being asserted, without their consent or knowledge, by an institution which may have an ulterior motive for opposing discovery. Therefore, in cases like *Rasmussen*, the courts must consider whether a blood organization should be allowed to assert the privacy rights of its blood donors. This issue is of special importance because blood organizations may assert these rights on the pretext of protecting their donors while, in reality, they are attempting to insulate themselves from liability.[217]

5. The consideration of blood bank liability for transfusion of AIDS. — As noted in the analysis of AIDS, blood centers did not employ uniform AIDS screening techniques prior to the institution of the HTLV-III test for antibodies in March, 1985.[218] As previously indicated, many centers refused to question their donors about sexual habits because of moral and ethical considerations.[219] One author recently noted this practice and identified it as a legitimate basis for blood bank liability in transfusion transmission cases:

> [The philosophy] that direct questions regarding a donor's sexual preference are inappropriate because of moral and ethical considerations allows for a defensible argument that reasonable precautions were not taken to preclude high risk groups from donating blood. In considering the catastrophic consequences involved in contracting AIDS, a court could ask if the American Association of Blood Banks and Public Health Service recommendations are adequate, even if accepted and practiced as the standard of care by the medical community. . . . [C]ourts have been willing to hold that a standard that is accepted by the medical community is of itself unacceptable due to the severity of the damage that results from following such a standard.[220]

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[217]One court recently noted the irony of allowing an individual who has a "stake" in the outcome of the suit to oppose investigation of the matter by asserting the constitutional rights of a third person. In United States v. University Hospital, 575 F. Supp. 607 (E.D.N.Y. 1983), the federal government was investigating whether a hospital had wrongfully withheld medical care from a deformed infant whose parents refused to consent to surgical treatment. The parent-intervenors asserted that the child's medical records were protected by the constitutional right to privacy. The court stated in dictum:

> The defendants' reliance upon the constitutional right of privacy is extremely weak. In the instant action, plaintiff is, at least implicitly, alleging the possibility that the parents of Baby Jane Doe, in refusing their consent to surgical procedures, were not acting in the best interests of the child. It would be highly paradoxical if an individual's right to privacy could be asserted by that individual's parent or guardian, purportedly acting in that individual's own best interests, for the purpose of precluding an inquiry into the question of whether the parent or guardian was in fact acting in the individual's best interests.

Id. at 615-16.

[218]*See supra* notes 44-48 and accompanying text.

[219]*Id.*

[220]Miller, *supra* note 23, at 3421. *See also* Appellant's Brief, *supra* note 12, at 11 ("A blood bank's potential total failure to screen high risk groups from donation by

The almost certain prognosis of death in AIDS cases may call for the highest possible standard of care in blood donor screening. The fact that a blood collection center adhered to a protocol requiring less, even if approved by medical authorities, may be insufficient to avoid liability in the courtroom.[221]

Because a blood organization's basis for liability may be extremely broad in AIDS-related cases, and because the majority of transfusion transmission lawsuits have yet to surface,[222] it would be advantageous for a blood bank to ensure the confidentiality of its donor records. Therefore, in cases like *Rasmussen*, the courts should not address claims of constitutional rights until they are asserted by the individuals possessing those rights. Should the blood donors become involved in a lawsuit, they would face no obstacle to the assertion of their rights. That is, the nonparty donors, if faced with oppressive questioning, could move for a protective order just as nonparty South Florida did in *Rasmussen*.[223] Moreover, the courts possess virtually unlimited discretion by which to protect the donors' rights, if and when they are asserted.[224] On this basis, and in view of the remoteness of the possibility that the donors' intimate lives will be probed, the courts should grant discovery of the blood donors' identities. By granting discovery, the courts will promote fair and efficient litigation, prevent blood banks from masking their own liability, and reserve their judicial discretion for the protection of those who may choose to assert their constitutional rights.

V. Conclusion

AIDS-related lawsuits present multifaceted issues for which no clear guidelines exist. As the dimensions of the disease unfold, the legal implications compound. *Rasmussen* presents one court's version of a proper balance of the interests involved in the issue of donor discovery. Its status as the initial precedent in a rapidly expanding field could engender many analogous decisions. Caution should be used, however, in following the "law" of *Rasmussen*; as noted by the dissent in that case, it appears that the majority "put its thumb on the scales" of justice.[225]

The plaintiff's interest in pursuing meaningful discovery in the hope of obtaining full compensation must be accorded the weight it deserves. There is no form of discovery incapable of becoming oppressive; if all

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available methods would never surface if the donors' names were suddenly to become totally confidential and non-discoverable.").

[221]Miller, *supra* note 23, at 3421.

[222]*See supra* notes 13-14 and accompanying text.

[223]467 So. 2d at 800.

[224]*See supra* note 210.

[225]467 So. 2d at 805 (Schwartz, C.J., dissenting).

potentially intrusive discovery were prohibited on the basis that it might meet resistance, few disputes would reach resolution in the legal forum. Moreover, the courts have broad discretion in molding the form and scope of discovery. In a case like *Rasmussen*, the names of the donors need not be brought into court, and the form of questioning can be controlled. The state interest in ensuring the fair and efficient resolution of disputes, along with the plaintiff's interest, should not be preempted by the remote possibility of abusive discovery when the court itself possesses the means to control the discovery process, should the need ever arise.

Rasmussen's interpretation of the disclosural right to privacy must be recognized for what it is — a broad extension of the Supreme Court's interpretation of that right. The case law upon which this extension was predicated does not support the *Rasmussen* conclusion; neither do the decisions of the United States Supreme Court. There is no "general" constitutional right to privacy. Aside from the right of privacy applied in relation to specific constitutional guarantees, the Supreme Court has narrowly limited the extension of the right to areas of fundamental concern: marriage, procreation, child rearing, education, contraception, and family relationships. Moreover, the Supreme Court has never upheld the disclosural right to privacy. A court choosing to extend that right to the drug use, medical, and sexual histories of voluntary blood donors must appreciate the magnitude of such an extension; it cannot be easily reconciled with cases like *Whalen*, *Paul*, and *Nixon*. Futhermore, there is a distinct possibility that a blood organization may have a self-serving ulterior motive for its tactics — the avoidance of prosecution.

Although lawsuits involving transfusion transmission of AIDS have just begun to surface, that particular mode of transmission, in light of the highly accurate HTLV-III antibody test, is virtually at an end. The assertion, therefore, that the fear of later questioning may prevent individuals from donating their blood is no longer of significant weight. Applying the *Whalen*[226] test of remoteness, this interest must take second place to the unequivocal interest of the plaintiff.

It is entirely possible that a proper "balance" of the interests may, in different fact situations, lead to diametric results. The concern, as the courts approach AIDS-related issues, is not that one result be uniformly reached; rather, it is that the respective interests be accorded their true legal weight.

DENISE CLARE ANDRESEN

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[226]*See supra* notes 148-58 and accompanying text.

The 1978 Hatch Amendment: Attempted Applications Are Failing to Protect Pupil Rights

I. Introduction

Numerous courtroom battles have been waged recently over school curriculum and textbook selection,[1] the removal of books from school libraries,[2] and the censorship of student activities.[3] The proper role of public schools as an inculcator of community values or as a "marketplace of ideas" is also in debate.[4] In these legal disputes, parents,[5] students,[6] teachers,[7] and even school boards[8] are asserting their constitutional rights.

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[1]*See, e.g.*, Pratt v. Independent School Dist., 670 F.2d 771 (8th Cir. 1982) (banning of film used in high school English course, "The Lottery," enjoined); McLean v. Arkansas Bd. of Educ., 529 F. Supp. 1255 (E.D. Ark. 1982) (board of education enjoined from implementing a state statute mandating balanced treatment of creation and evolution sciences), *aff'd*, 723 F.2d 45 (8th Cir. 1983); Todd v. Rochester Community Schools, 41 Mich.App. 320, 200 N.W.2d 90 (1972) (parents' challenges to assigning the book *Slaughterhouse Five* in a high school literature class dismissed); *see also* Lichtenstein, *Children, The Schools, and The Right to Know: Some Thoughts at the Schoolhouse Gate*, 19 U.S.F.L. Rev. 91, 91-92 nn.2 & 4 (1985).

[2]*See, e.g.*, Bicknell v. Vergennes Union High School Bd. of Directors, 638 F.2d 438 (2d Cir. 1980) (suit challenging the removal of *Dog Day Afternoon* and *The Wanderers* from school library dismissed); Zykan v. Warsaw Community School Corp., 631 F.2d 1330 (7th Cir. 1980) (challenging the removal of *Go Ask Alice, The Bell Jar*, and *The Stepford Wives* from a high school library); Minarcini v. Strongsville City School Dist., 541 F.2d 577 (6th Cir. 1976) (removal of *Cats Cradle* and *Catch 22* from high school library enjoined); *see also* Lichtenstein, *supra* note 1, at 92 n.3.

[3]*See, e.g.*, Seyfried v. Walton, 668 F.2d 214 (3d Cir. 1981) (banning of high school student production of "Pippin" upheld); Trachtman v. Anker, 563 F.2d 512 (2d Cir. 1977) (school administrator's suppression of high school students' plans to distribute and publish in the school newspaper a survey of the student body's sexual attitudes upheld); Baughman v. Freienmuth, 478 F.2d 1345 (4th Cir. 1973) (parents' first amendment challenge to a regulation allowing a high school principal to prohibit distribution on school grounds of certain materials denied); *see also* Lichtenstein, *supra* note 1, at 92-93 n.5.

[4]*See* Comment, *What Will We Tell the Children? A Discussion Of Current Judicial Opinion On The Scope Of Ideas Acceptable For Presentation in Primary and Secondary Education*, 56 Tulane L. Rev. 960 (1982) [hereinafter cited as Comment, *Discussion*]; *see also infra* notes 43-56 and accompanying text.

[5]*See* Board of Educ. v. Pico, 457 U.S. 853 (1982); Minarcini v. Strongsville School Dist., 541 F.2d 577; Loewen v. Turnipseed, 488 F. Supp. 1138 (N.D. Miss. 1980).

[6]*See, e.g.*, Pratt v. Independent School Dist., 670 F.2d 771; Bicknell v. Vergennes Union High School Bd. of Directors, 638 F.2d 438; Minarcini v. Strongsville School Dist., 541 F.2d 577; Loewen v. Turnipseed, 488 F. Supp. 1138.

[7]*See, e.g.*, Keefe v. Geanakos, 418 F.2d 359 (1st Cir. 1969); Wilson v. Chancellor, 418 F. Supp 1358 (D. Or. 1976); Sterzing v. Fort Bend Indep. School Dist., 376 F. Supp 657 (S.D. Texas 1972).

[8]*See, e.g.*, Board of Educ. v. Pico, 457 U.S. 853 (1982); Zykan v. Warsaw Community School Corp., 631 F.2d 1300.

Another battle involving the education of school children has developed as a result of some final regulations issued by the Department of Education in 1984.[9] These regulations, which became effective in November, 1984, implemented the 1978 "Protection of Pupil Rights Act,"[10] more commonly known as the Hatch Amendment. The first provision of the Hatch Amendment requires that under most programs funded by the Department of Education, schools must make available for parental inspection all instructional materials to be used in any research or experimentation program or project in which their children participate.[11] The second provision of the Hatch Amendment requires that schools obtain written parental consent prior to a student's participation in federally funded psychiatric or psychological examination, testing, or treatment, if the primary purpose is to reveal information concerning: (1)"political affiliations"; (2)"mental and psychological problems potentially embarrassing to the student or his family"; (3)"sex behavior and attitudes"; (4)"illegal, anti-social, self-incriminating and demeaning behavior"; (5)"critical appraisals of other individuals with whom respondents have close family relationships"; (6)"legally recognized privileged and analogous relationships, such as those with lawyers, physicians, and ministers"; or (7)"income."[12] The Department of Education's 1984 regulations define psychiatric and psychological examination, testing, and treatment[13] and also explain the procedure for filing a complaint under the Hatch Amendment.[14]

The proponents of the Hatch Amendment were certain parent and "concerned citizen" groups who have a traditional view of how and what students should be taught in school.[15] Various teaching methods

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[9]34 C.F.R. §§ 98.1-98.10 (1985).

[10]20 U.S.C. § 1232h (Supp. 1985).

[11]20 U.S.C. § 1232h(a) (Supp. 1985). *Inspection by Parents or Guardians of Instructional Material*:

> All instructional material, including teacher's manuals, films, tapes, or other supplementary instructional material which will be used in connection with any research or experimentation program or project shall be available for inspection by the parents or guardians of the children engaged in such program or project. For the purpose of this section "research or experimentation program or project" means any program or project in any applicable program designated to develop new or unproven teaching methods or techniques.

In this Note, the use of the word "parents" or "parental" also includes the rights of a "guardian" of a child.

[12]20 U.S.C. § 1232h(b) (Supp. 1985).

[13]34 C.F.R. §§ 98.3-98.4 (Supp. 1985).

[14]34 C.F.R. § 98.7 (Supp. 1985).

[15]Proponents include, among others, the Eagle Forum, American Education Coalition, National Council for Better Education, Maryland Coalition of Concerned Parents for Privacy Rights in Public Schools, Guardians of Education for Maine, The American Coalition for Traditional Values, and other "pro-family" organizations. The Hatch Amendment

developed during the 1970's, sex education, and school textbooks that emphasize evolution rather than divine creation are all considered objectionable.[16] Proponents claim the Hatch Amendment and the regulations protect students from "psychiatric meddling"[17] and "psychological abuse,"[18] "federal thought control,"[19] "mind-bending" surveys,[20] and also prevent invasions into the students' personal and family matters.[21] The opponents of the Hatch Amendment include various professional education groups, scientific associations, and civil rights groups.[22] Opponents claim the Hatch Amendment and the regulations affect curriculum, restrict teachers' and students' academic freedom, and curtail the school's function as a marketplace of ideas.[23]

This Note will examine the background of the Hatch Amendment and the regulations issued by the Department of Education to implement the Hatch Amendment. This Note will also discuss the constitutionality of the Hatch Amendment and the regulations both on their face and as applied to various groups attempting to use them throughout the nation's schools. Finally, this Note will propose some solutions to the Hatch Amendment controversy.

II. A Dual Background

The Hatch Amendment is best understood if one has some knowledge of the background surrounding the amendment. The first part of this section concerns research and experimentation in public schools. The

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Coalition, The Hatch Amendment Regulations: A Guidelines Document 15-18 (June 1985) (available from American Association of School Administrators) [hereinafter cited as Guidelines].

[16]Richburg, *Secular Humanists Challenged in Schools by Fundamentalists*, The Indianapolis Star, January 5, 1986, at 25, col. 1 [hereinafter cited as *Challenged in Schools*].

[17]Donahue Transcript No. 02275, Multimedia Entertainment Inc., 1 (1984) (transcript of the Phil Donahue show) [hereinafter cited as Transcript].

[18]B. Lynn, Growing Threats to Academic Freedom: "The Hatch Amendments," 2 (May 30, 1985) (available from American Civil Liberties Union, Washington, D.C.).

[19]Lewis, *Little Used Amendment Becomes Divisive, Disruptive Issue*, Phi Delta Kappan 667, 668 (June 1985) (citing P. Schlafly).

[20]124 Cong. Rec. 27,423 (1978).

[21]*Id.*; *see also* W. Riley, U.S. Department of Education, Comments to Statewide Meeting of Student Personnel, Tallahassee, Florida (September 18, 1985).

[22]Guidelines, *supra* note 15, at 1 (Opponents include, among others, American Civil Liberties Union, American Association of School Administrators, National Parent Teachers Association, American Association of Colleges of Teachers Education Association for the Advancement of Psychology, Council for Education and Development, Federation of Behavioral Psychological and Cognitive Science, National Association of School Psychologists, and People for the American Way).

[23]Lynn, *supra* note 18, at 7-9; *see also infra* notes 163-83 and accompanying text.

second part of this section examines the roles of public schools in our society and the concept of academic freedom in the classroom.

A. Prior Research in the Schools: An Open Door Policy

Since the 1950's, American schools have welcomed researchers conducting various psychological studies.[24] Researchers recognized schools as having " 'boundless laboratory opportunities' " and " 'tremendous potential' " for child-related studies.[25] Encouraged by school administrators, researchers took full advantage of their opportunities.[26] For example, at the 1969 national convention of the American Educational Researchers Association, only three of the sixty-six researchers making presentations of their studies had at any time in their careers been denied permission to conduct research in public schools.[27]

In the late 1950's and throughout the 1960's, however, some parents expressed concern about the extent of the research being conducted in public schools.[28] These parents believed that much of this research was nonacademic in nature. In 1959, the Houston School District Governing Board ordered the burning of the answer sheets to six "socio-psychometric" tests administered to five thousand ninth graders in the city's school system.[29] Parents objected to questions concerning the students' perceptions of themselves and their relationships with families, peers, and teachers.[30]

In 1966, in New York, a similar incident occurred after the New York City Board of Education permitted researchers to administer a personality test to 350 ninth-grade students without any prior parental

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[24]Dellinger, *Experimentation in the Classroom: Use of Public School Students as Research Subjects*, 12 J. LAW & EDUC. 347, 349 (1983).

[25]*Id.* (citing Mullen, *The School as a Psychological Laboratory*, 14 AM. PSYCHOLOGIST 53 (1959)).

[26]*Id.*

[27]*Id.* at 349-50 (citing Clasen et al., *Access to Do Research in Public Schools*, 38 J. EXPER. EDUC. 16 (1969))

[28]*Id.* at 350. *See also Special Inquiry on Invasion of Privacy: Hearing of Subcomm. on Invasion of Privacy of House Governmental Operations Comm.*, 89th Cong., 1st Sess. 301-02 (1965) [hereinafter cited as *Special Inquiry*].

[29]Dellinger, *supra* note 24, at 350 (citing Nettler, *Test Burning in Texas*, 14 AM. PSYCHOLOGIST 682 (1959)). The socio-psychometric tests consisted of a Vocabulary-Information profile test, an Interest Bank, a high school personality test, a student information bank, a "sociometric rating device," and the Youth Attitude Scales. *Id.* at 350 n.11.

[30]Nettler, *Test Burning in Texas*, 14 AM. PSYCHOLOGIST 682 (1959). Objectionable questions included: "I enjoy soaking in the bathtub"; "A girl who gets into trouble on a date has no one to blame but herself"; "If you don't drink in our gang, they make you feel like a sissy"; "Sometimes I tell dirty jokes when I would rather not"; "Dad always seems too busy to pal around with me." The objectionable questions were taken from an earlier survey of 13,000 school children in Texas that had evoked no parental objections. *Id.*

consent.[31] The test included numerous questions about personal attitudes and practices relating to sex and religion.[32]

In 1973, in *Merriken v. Cressman*,[33] the only reported court case involving psychological research in a public school, an eighth-grade student and his mother brought an action against the school principal and other members of the local school board. The school was planning to use a psychological questionnaire in the school district as part of a "Critical Period of Intervention" program designed to identify potential drug abusers.[34] The plaintiffs alleged that the questionnaire and the entire program violated their constitutional rights to privacy.[35] The questionnaire asked such questions as the family religion, the family composition, including the reason for the absence of one or both parents, and whether one or both parents "hugged and kissed me good night when I was small," "tell me how much they love me," "enjoy talking about current events with me," and "make me feel unloved."[36]

The federal district court agreed with the Merrikens and permanently enjoined the school district from implementing the entire drug prevention program.[37] The court stated: " 'Students are persons under the Constitution; they have the same rights and enjoy the same privileges as adults. Children are not second class citizens.' "[38] After balancing individual privacy rights against state rights to invade that privacy for the sake of public interest, the court concluded that, based on these facts, the student would lose more than society could gain.[39]

Parental concern about the education and privacy rights of their children and disapproval of psychological research programs and questionnaires in schools led to congressional involvement.[40] In 1962, Representative John Ashbrook of Ohio introduced a bill requiring parental knowledge of, and consent for, their children's participation in federally funded research relating to students' personalities, home life, family

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[31]Dellinger, *supra* note 24, at 350. The test was the Minneapolis Multiphasic Personality Inventory.

[32]Some of the true-false questions were: my sex life is satisfactory; evil spirits possess me at times; I am very strongly attracted by members of my own sex; I believe in a life hereafter; I have never indulged in any unusual sex practices; I believe my sins are pardonable; many of my dreams are about sex matters; I am a special agent of God; I pray several times a week; there is something wrong with my sex organs; I like movie love scenes. 112 CONG. REC. 7,733 (1966).

[33]364 F. Supp. 913 (E.D. Pa. 1973).

[34]*Id.* at 914.

[35]*Id.* at 917.

[36]*Id.* at 916.

[37]*Id.* at 922.

[38]*Id.* at 919 (quoting Miller v. Gillis, 315 F. Supp. 94 (N.D. Ill. 1969)).

[39]*Id.* at 921.

[40]Dellinger, *supra* note 24, at 350.

relationships, sexual behaviors, and religious beliefs.[41] Congress did not pass Ashbrook's bill.

In 1966, Representative Benjamin S. Rosenthal of New York introduced a bill similar to Ashbrook's.[42] Rosenthal's bill prohibited the use of federal funds to support research involving the involuntary administration of personality tests in public schools.[43] The bill also required that if the student was under eighteen, the personality test could not be given without the prior consent of the child's parent. Rosenthal's bill did not pass either.

Rosenthal's bill, however, along with an earlier congressional subcommittee report,[44] alerted Congress to the seriousness of the problem.[45] The congressional subcommittee had examined, among others things, the role of psychological testing of school children in federally sponsored programs.[46] Legislators questioned the value of many of the studies, particularly those with questionnaires examining the student's self-image, family relationships, sexual experience, religious views, personal values, and facts about the student's parents.[47] The subcommittee recommended that parents have an opportunity to inspect questionnaires and give their permission before their children participate in such programs.[48] Eight years passed, however, before Congress enacted an amendment affecting student rights.

In 1974, Representative Jack Kemp of New York introduced an amendment to the General Education Provisions Act (GEPA).[49] This amendment, which passed, required recipients of federal funds to make available to parents of participating students instructional materials used in any program or project designed to explore or develop new or unproven

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[41]*See* R. Holland, *Analysis of the Protection of Pupil Rights Amendment — "The Hatch Amendment" — and the Department of Education's Final Regulations Regarding Students' Rights in Research, Experimental Activities and Testing* at 4 (June 1985) *reprinted in* GUIDELINES, *supra* note 15, at 4-11.

[42]Dellinger, *supra* note 24, at 350. Rosenthal's bill was partially in response to the New York City Board of Education's allowing researchers to administer personality tests to ninth-grade students without first obtaining parental consent. *See supra* notes 31-32 and accompanying text.

[43]*Id.*

[44]*Special Inquiry*, *supra* note 28.

[45]Dellinger, *supra* note 24, at 350-51.

[46]*Id.* at 351.

[47]*Id.*

[48]*Id.*

[49]Pub. L. No. 90-247, as amended 92 Stat. 2355 (1978). Two months after Congress passed the Kemp Amendment, Senator James Buckley of New York introduced an amendment designed, among other things, to protect the rights and privacy of parents and students. Senator Buckley's amendment passed. The provision, requiring parental consent prior to their children's participation in certain forms of experimental or attitude-affecting programs, however, was dropped from the enacted bill. Holland, *supra* note 41, at 4.

teaching methods or techniques supported by the federal government.[50] The Kemp Amendment also required that no child participate in any such program if his or her parents objected in writing. In 1978, Senator Orrin Hatch of Utah sponsored an amendment to the 1974 GEPA amendment.[51] The Hatch Amendment moved the parental consent requirement from the experimental programs provision to a new section. Schools were now required to obtain the prior written consent of a child's parents before the child could participate in any federally funded psychiatric or psychological examination, testing, or treatment in which the primary purpose was to reveal personal information concerning: (1)"political affiliations"; (2)"potentially embarrassing mental and psycholgical problems"; (3)"sex behavior and attitudes"; (4)"self-incriminating and demeaning behavior"; (5)"critical appraisals of family members"; (6)"legally recognized relationships, such as those with lawyers, physicians, and ministers"; or (7)"income."

The current regulations implementing the Hatch Amendment were issued by the Department of Education in 1984. These regulations define psychiatric and psychological examination, testing, and treatment and also explain how to resolve a complaint under the Hatch Amendment.[52]

B. Judicial Protection of Education

The second part of the background to the Hatch Amendment did not directly influence the drafting of the amendment but is necessary to understand it. In addition to protecting students' privacy rights, courts acknowledge the vital role of public schools in our society[53] and the guarantee of academic freedom in the classroom.[54] Education is designed to develop a student's intellectual capacity, morals, and other faculties necessary for effective participation in an open society.[55] Depending on

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[50]120 CONG. REC. 8,505 (1974).

[51]124 CONG. REC. 27,423 (1978).

[52]34 C.F.R. §§ 98.3-98.4, 98.7 (1985): "Psychiatric or psychological examination or test" means a method of obtaining information, including a group activity, that is not related to academic instruction and that is designed to elicit information about attitudes, habits, traits, opinions, beliefs or feelings; and "psychiatric or psychological treatment" means an activity involving the planned, systematic use of methods or techniques that are not directly related to academic instruction and that is designed to affect behavioral, emotional, or attitudinal characteristics of an individual or group.

[53]*See, e.g.*, Board of Educ. v. Pico, 457 U.S. 853, 864 ("schools are vitally important 'in the preparation of individuals as citizens' ") (quoting Ambach v. Norwick, 441 U.S. 68, 76-77 (1979)).

[54]*See, e.g.*, Keyishian v. Board of Regents, 385 U.S. 589, 603 (1967) (academic freedom is a special concern of the first amendment).

[55]Smalls, *A Legal Framework for Academic Freedom in Public Secondary Schools*, 12 J. LAW & EDUC. 529, 538 n.59 (1983) ("The function of education is to help the

the age and maturity of the students, various teaching methods are used to achieve these goals. At the primary school level,[56] education is generally indoctrinative because children are young and impressionable.[57] Schools inculcate students with those community values determined to be " 'necessary to the maintenance of a democratic political system.' "[58] Primary school children, because they are young and still developing their analytical ability, tend to be more passive in the classroom setting.[59]

A different situation often occurs at the secondary school level. Students in junior and senior high school[60] are more mature, less impressionable, and more capable of comparing and evaluating differing ideas and viewpoints.[61] By this time in their lives, students usually have been exposed to controversial ideas and differing viewpoints.[62] Young men and women between fourteen and sixteen years old are beginning to form their own judgments and "readily perceive the existence of conflicts in the world around them."[63] As the federal district court stated in *Wilson v. Chancellor*,[64] a case involving a high school teacher's right to invite a Communist to speak to a political science class, "[T]oday's high school students are surprisingly sophisticated, intelligent, and discerning . . . and are far from easy prey for even the most forcefully expressed, cogent, and persuasive words."[65] Because secondary students are more developed intellectually and more mature, schools may act less as an inculcator of community values and more as a marketplace of ideas.[66]

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growing of a helpless young animal into a happy, moral and efficient human being.")(quoting J. DEWEY, DICTIONARY OF EDUCATION 28 (R.B. Winn ed. 1959)); *see also* Bennett, *The Failure to Address Moral Responsibility*, The Indianapolis Star, February 11, 1985, at 8, col. 2.

[56]As used in this Note, primary school refers to the first through sixth grades.

[57]Comment, *Discussion, supra* note 4, at 962-63.

[58]Board of Educ. v. Pico, 457 U.S. at 864 (quoting Ambach v. Norwick, 441 U.S. 68, 76-77 (1979)).

[59]Comment, *Discussion, supra* note 4, at 963, 971.

[60]As used in this Note, junior high school refers to the seventh, eighth, and ninth grades; senior high school refers to the tenth, eleventh, and twelfth grades.

[61]Comment, *Discussion, supra* note 4, at 970.

[62]For example, in Russo v. Central School Dist. No. 1, 469 F.2d 623, 633 (2d Cir. 1972), *cert. denied*, 411 U.S. 932 (1973), a case involving a high school teacher's silent participation in the class pledge of allegiance, the court noted that students in the tenth grade "were not fresh out of their cradles."

[63]*Id.*

[64]418 F. Supp. 1358 (D. Or. 1976).

[65]*Id.* at 1368.

[66]Comment, *Discussion, supra* note 4, at 963, 970-71. The marketplace of ideas concept was brought into first amendment jurisprudence in Justice Holmes' dissent in Abrams v. United States, 250 U.S. 616, 630 (1919), where he stated that the "ultimate good desired is better reached by free trade in ideas . . . the best test of truth is the power of the thought to get itself accepted in the competition of the market. . . ." Although *Abrams* involved a

The goal under the marketplace of ideas model of education is to expose students to a wide variety of different ideas and viewpoints in order to stimulate the student's reasoning ability.[67] Some of these ideas and viewpoints may be controversial, sensitive, or have no correct answer. The acquisition of knowledge, and learning in general, however, assumes that people may differ in their views on any particular topic.[68] Exposure to a wide variety of ideas helps students prepare for "active and effective participation in the pluralistic, often contentious society in which they will soon be adult members."[69]

Academic freedom in the classroom supports the marketplace of ideas concept and the goals of education. In *Meyer v. Nebraska*,[70] the United States Supreme Court held unconstitutional a statute prohibiting the teaching of foreign languages to students who had not yet completed the eighth grade. Rejecting the Nebraska legislature's attempt to interfere with the opportunities of pupils to acquire knowledge, the Court stated, "The American people have always regarded education and acquisition of knowledge as matters of supreme importance which should be diligently promoted."[71] In another Supreme Court decision, *Keyishian v. Board of Regents*,[72] involving the freedom of speech, inquiry, and association of university faculty members, Justice Brennan, speaking for the Court, said:

> Our Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us . . . . That freedom is therefore a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom. . . . The classroom is peculiarly the "marketplace of ideas." The Nations's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth "out of a multitude of tongues, [rather] than through any kind of authoritative selection."[73]

Although the Hatch Amendment was drafted amidst the concern over protecting students' privacy rights from intrusive psychological research in public schools, the amendment must function alongside the

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conspiracy to violate the Espionage Act, Justice Holmes' marketplace of ideas concept has since been applied in other opinions recognizing first amendment rights in the schools. *See, e.g.*, Board of Educ. v. Pico, 457 U.S. 853, 877 (1982); Keyishian v. Board of Regents, 385 U.S. 589, 603 (1967).

[67]Comment, *Discussion, supra* note 4, at 963-64.

[68]*See* Wieman v. Updegraff, 344 U.S. 183, 196-97 (1952) (Frankfurter, J., concurring).

[69]Board of Educ. v. Pico, 457 U.S. at 868.

[70]262 U.S. 390 (1923).

[71]*Id.* at 400.

[72]385 U.S. 589 (1967).

[73]*Id.* at 603.

courts' recognition of the roles of public schools and of academic freedom in the classroom.

III. Constitutionality of the Hatch Amendment

The stated purpose of the Hatch Amendment was to prohibit federally funded nonscholastic testing and research of students without prior written consent by their parents.[74] One court has recognized a constitutional right to privacy that protects students' relationships with their families.[75] Occasionally, nonscholastic testing and research has violated this right to privacy.[76] The Hatch Amendment was drafted to protect students' privacy rights by requiring parental consent. Although this purpose of the Hatch Amendment is constitutional, the amendment could be drafted or applied in an unconstitutional manner.

A. A Facial Examination

An examination of a piece of legislation on its face requires an analysis of the written language for vagueness and overbreadth. In *Grayned v. City of Rockford*,[77] the United States Supreme Court stated that a law "is void for vagueness if its prohibitions are not clearly defined."[78] The void-for-vagueness doctrine, however, is usually invoked only to invalidate criminal statutes[79] and the Hatch Amendment imposes no criminal sanctions for a violation.

The Hatch Amendment, apart from the Department of Education regulations, is not unconstitutionally vague on its face. The first provision specifically states that the Amendment applies only to research or experimentation programs or projects, funded wholly or in part by the Department of Education, primarily designed to explore new or unproven teaching methods or techniques.[80] Thus, the Hatch Amendment is not applicable to any program supported by local, state, or other federal agency funds. Although "new or unproven teaching methods or techniques" is not defined in the amendment or regulations, a Department of Education official explained the phrase to mean "[a method or

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[74]124 Cong. Rec. 27,423 (1978). *See also* 131 Cong. Rec. S1390 (daily ed. Feb. 19, 1985) (statement of Sen. Hatch).

[75]Merriken v. Cressman, 364 F. Supp. at 917-18. The court stated: "[T]here probably is no more private a relationship, excepting marriage, which the Constitution safeguards than that between parent and child." *Id.* at 918.

[76]Riley, *supra* note 21, at 14.

[77]408 U.S. 104 (1972).

[78]*Id.* at 108.

[79]*See* Wilson v. Chancellor, 418 F. Supp. 1358, 1365 (D. Or. 1976). Vagueness challenges may occur in quasi-criminal legislation also. *See* American Booksellers Ass'n v. Hudnut, 598 F. Supp. 1316 (S.D. Ind. 1984), *aff'd*, 771 F.2d 323 (7th Cir. 1985), *aff'd*, 106 S. Ct. 1172, *reh'g denied*, 106 S. Ct. 1664 (1986).

[80]*See supra* note 11.

technique] which is new to the respective local education agency."[81] If certain instructional materials have not been used in a school system previously, the teaching method is "new or unproven." The first provision also states specifically that the authority granted to parents is the right to inspect all instructional materials used in the project.

The language in the second provision of the Hatch Amendment also is not vague. The second provision requires schools to obtain prior written consent from a student's parents only if a child will participate in a nonscholastic, psychiatric, or psychological research program funded by the Department of Education.[82] Further, the primary purpose of the examination or test must be to reveal information in any of the seven personal areas. The language in the Hatch Amendment is specific enough for its requirements to be understood. Thus, a court probably would not declare this provision unconstitutional because of vagueness.

Overbreadth, however, could still render the Hatch Amendment unconstitutional. Overbroad statutes, like vague ones, are objectionable because they deter constitutionally protected activity.[83] Recently, courts have been less willing to invalidate legislation because of overbreadth.[84] Unless the overbreadth is both real and substantial, a court will construe

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[81]GUIDELINES, *supra* note 15, at 31.

[82]20 U.S.C. § 1232h(b) (Supp. 1985) provides:

Psychiatric or psychological examinations, testing, or treatment:

> No student shall be required, as part of any applicable program, to submit to psychiatric examination, testing, or treatment, in which the primary purpose is to reveal information concerning:
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> (1) political affiliations;
>
> (2) mental and psychological problems potentially embarrassing to the student or his family;
>
> (3) sex behavior and attitudes
>
> (4) illegal, anti-social, self-incriminating and demeaning behavior;
>
> (5) critical appraisals of other individuals with whom respondents have close family relationships;
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> (6) legally recognized privileged and analogous relationships, such as those of lawyers, physicians, and ministers; or
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> (7) income (other than that required by law to determine eligibility for participation in a program or for receiving financial assistance under such program), without the prior consent of the student (if the student is an adult or emancipated minor), or in the case of an unemancipated minor, without the prior written consent of the parent.

[83]Grayned v. City of Rockford, 408 U.S. 104, 114 (1972). An overbroad statute includes within its scope conduct or activities that are constitutionally protected. J. NOWAK, R. ROTUNDA, & J. YOUNG, HANDBOOK ON CONSTITUTIONAL LAW 868 (1983).

[84]Torke, *The Future of First Amendment Overbreadth*, 27 VAND. L. REV. 289, 299-308 (1974).

the legislation to save it.[85] The Hatch Amendment's language is not overbroad because it does not interfere with any protected right of students or parents. Parents routinely have the right to inspect instructional materials used in school programs[86] and the Hatch Amendment does not affect this right. The amendment simply requires schools to make available certain instructional materials. Parents still have the choice whether to inspect the materials.

Furthermore, the Hatch Amendment does not affect parents' right to control their children's education.[87] The amendment permits parents to excuse their children from participation in any applicable research program. Parents generally have had this right in the past.[88]

The Hatch Amendment has its limits also. Parents of children participating in the particular research programs, or even the Department of Education, have no right to "remove, revise or otherwise affect any curricula."[89] This power remains vested firmly in the states and local school boards.[90]

The Hatch Amendment is constitutional on its face, therefore, because the language is not vague or overbroad. The amendment may also protect the health and well-being of children.[91] The Hatch Amendment regulations, however, may not be constitutional as they are written. In an address to Congress to clarify the intent of the amendment, Senator

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[85]*Id.* at 300 (citing Broadrick v. Oklahoma, 413 U.S. 601, 615 (1973)); *see also id.* at 301 n.64 (citing Gooding v. Wilson, 405 U.S. 518, 528 (1972) (Burger, C.J., dissenting)); *id.* at 302 n.75 (citing, *inter alia*, Schneider v. Smith, 390 U.S. 17 (1968)).

[86]National Education Association Human and Civil Rights, The Hatch Amendment, 2 (February 1985) [hereinafter cited as Civil Rights].

[87]*See, e.g.*, Prince v. Commonwealth of Mass. 321 U.S. 158, 165-66 (1944) (citing Pierce v. Society of Sisters, 268 U.S. 510, 534-35 (1925); and Meyer v. State of Nebraska, 262 U.S. 390, 401 (1923)).

[88]Comment, *Discussion, supra* note 4, at 988 n.114 (commenting on public school "excusal system" giving parents the option of withdrawing their children from sex education

[89]Department of Education, *Fact Sheet, Student Rights in Research, Experimental Activities and Testing* [hereinafter cited as *Fact Sheet*]. Section 432 of the General Education Provisions Act, 20 U.S.C. § 1232a, prohibits any federal officer from exercising any control over curriculum. The issue of enforcement of the Hatch Amendment is beyond the scope of this Note.

[90]*See* Board of Educ. v. Pico, 457 U.S. 853, 864 (1982); Russo v. Central School Dist. No. 1, 469 F.2d 623, 633 (2d Cir. 1972), *cert. denied*, 411 U.S. 932 (1973) (citing James v. Board of Educ., 461 F.2d 566, 573 (2d Cir.), *cert. denied*, 409 U.S. 1042 (1972)).

[91]In Merriken v. Cressman, 364 F. Supp. 913 (E.D. Pa. 1973), two child psychologists gave uncontradicted testimony as to potentially harmful aspects of a psychological questionaire used in a drug prevention program. Severe loyalty conflicts may result from the types of personal questions asked concerning the family relationship. Another harm is scapegoating in which a student is unpleasantly treated by his peers either because of a refusal to take the test or because of the test results. *See also supra* notes 33-39 and accompanying text.

Hatch admitted that "there are some ambiguities and some vague definitions" in the regulations.[92] The section of the regulations to which Senator Hatch referred defines "psychiatric or psychological examination or test" as a "means of obtaining information, including a group activity, that is not directly related to academic instruction and that is designed to elicit information about attitudes, habits, traits, opinions, beliefs, or feelings."[93] The controversy has resulted from expansive interpretations of the regulations.[94] Various groups are attempting to apply the Hatch Amendment restrictions to curriculum and classroom materials and activities which are outside the scope of the statute.[95] As Senator Hatch explained to Congress in 1985:

> [S]ome parent groups have interpreted both the statute and the regulations so broadly that they would have them apply to all curriculum materials, library books, teacher guides, et cetera, paid for with State or local money. [Some parent groups] would have all tests used by teachers in such nonfederally funded courses as physical education, health, sociology, literature, et cetera, reviewed by parents before they could be administered to students.[96]

The Department of Education also acknowledges that the regulations "lend themselves to various interpretations."[97] Some school officials have alleged that the "sloppily drafted"[98] regulations have "invited misrepresentation"[99] and have led to a misuse of the Hatch Amendment.

The regulations' definitions of psychiatric and psychological examination, testing, and treatment are much broader than the professional scientific community's idea of this type of activity.[100] The professional scientific community uses psychiatric or psychological tests as educational tools.[101] These tests are usually taken individually to gather certain information from the student. This information is then used by a professional counselor to help a child adjust to the school environment or possibly improve academic performance. Traditionally, psychiatric or psychological testing methods have included cognitive reasoning tests,

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[92] 131 CONG. REC. S1390 (daily ed. Feb. 19, 1985) (statement of Sen. Hatch).

[93] 34 C.F.R. § 98.4(c)(1) (1985); *see also supra* note 73.

[94] 131 CONG. REC. S1389 (daily ed. Feb. 19, 1985) (statement of Sen. Hatch).

[95] *Id.*

[96] *Id.*

[97] *Id.* at 1390.

[98] Fiske, *The Hatch Act Comes Alive*, N.Y. Times, July 7, 1985, § 4, at E7, col. 2.

[99] N.E.A. on Hatch Amendment and Regulations, National Education Association, 1 [hereinafter cited as N.E.A.].

[100] GUIDELINES, *supra* note 15, at 32.

[101] *Id.* at 32-33.

personality and interest inventories, situational tests, and various educational achievement tests.[102]

In contrast, the "loose and imprecise"[103] definitions in the regulations may include normal classroom discussions and activities unrelated to any type of psychiatric or psychological testing.[104] One Department of Education official suggested that classroom exercises in which students have to write about their attitudes on "single-parent families" or discuss their views on nuclear war, could, under certain circumstances, require prior written consent.[105] The head of the Department of Education Department's Office of Management that deals with complaints under the Hatch Amendment said that teachers can talk about nuclear war, abortion, and alcohol or drug abuse, but the teacher cannot ask a student what he or she feels about these topics.[106] Under this type of classroom environment, however, the students' ability to question or challenge the teacher's view, and consequently, develop or change their own positions, is denied. Students probably learn better when education is more of a dialogue than a one-way lecture.

The regulations' definitions are also flawed because they fail to explain what activities are "not directly related to academic instruction." The Department of Education has said that Hatch Amendment complaints will be handled on a case-by-case basis with the Department acting as factfinder.[107] Under this scheme, a teacher is unable to know for sure if an activity violates the amendment. Forcing a teacher to guess about the nature of an activity is not conducive to a proper academic environment. If a teacher is not sure whether a certain classroom activity or material "directly relates to academic instruction," then the teacher may decide to use something more traditional rather than obtain parental consent from the entire class or risk government intervention.[108]

In *Parducci v. Rutland*,[109] a case involving the dismissal of a high school teacher for assigning a controversial short story to her eleventh grade English class,[110] the federal district court stated:

> When a teacher is forced to speculate as to what conduct is permissible and what conduct is proscribed, he is apt to be overly cautious and reserved in the classroom. Such a reluctance on

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[102]*Id.* at 32.

[103]N.E.A., *supra* note 99, at 1.

[104]Lynn, *supra* note 18, at 7.

[105]*Id.*

[106]Lewis, *supra* note 19, at 668.

[107]*Id.*

[108]Lynn, *supra* note 18, at 8.

[109]316 F. Supp. 352 (M.D. Ala. 1970).

[110]The short story was *Welcome to the Monkey House* by Kurt Vonnegut. *Id.* at 353.

> the part of the teacher to investigate and experiment with new and different ideas is anathema to the entire concept of academic freedom.[111]

Vague regulations force an instructor to guess which activities, teaching methods, or materials are proper for use in class. Teachers should encourage openmindedness and free inquiry in the classroom. Consequently, restrictions on a teacher's freedom in the classroom should be clear and precise.

In addition to requiring clear and precise restrictions, courts may also consider the potential penalties of a statute or regulation in determining whether legislation is vague.[112] A violation of the Hatch Amendment which remains unresolved at the local or state level may ultimately result in the Secretary of Education terminating or withholding federal funds to a school.[113] Such potentially severe penalties should be imposed upon a school only when narrowly defined regulations, clearly describing the prohibited conduct, are understood by all of the teachers. The Hatch Amendment regulations do not clearly describe the activities that require prior parental consent.

The Hatch Amendment regulations provide no guidance to teachers concerning activities that are not related to academic instruction and thus require parental consent.[114] Therefore, teachers must choose between a creative activity that carries the risk of federal intervention and a traditional activity that carries the risk of not stimulating or intellectually challenging students. Neither situation is desirable from an educational perspective. Further, the breadth of the regulations' definitions of psychiatric and psychological examination, testing, and treatment may include normal classroom discussion and activities.

These defects of vagueness and overbreadth raise serious doubts as to the constitutionality of the Hatch Amendment regulations on their face. Courts would probably not strike the regulations for vagueness, however, because no criminal penalties are at stake and federal funds are withdrawn only in extreme situations.[115] Additionally, courts probably would not strike the Hatch Amendment regulations for overbreadth because of a reluctance to raise hypotheticals to test the scope of legislation.[116] Therefore, the Hatch Amendment regulations, although

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[111] *Id.* at 357.

[112] Wilson v. Chancellor, 418 F. Supp. 1358, 1365 (D. Or. 1976).

[113] 34 C.F.R. § 98.10(1) (1985).

[114] *See supra* notes 107-08 and accompanying text.

[115] Of the six complaints reviewed by the Department of Education as of September 1985, not one had resulted in a termination or withholding of Department of Education funds. Riley, *supra* note 21, at 8.

[116] *See* Torke, *supra* note 84, at 294 nn. 34 & 35.

"loose and imprecise,"[117] subject to various interpretations,[118] "sloppily drafted,"[119] and containing "some vague definitions,"[120] would probably survive a facial examination.

B. Misapplying the Hatch Amendment and Regulations

Even if the Hatch Amendment and the regulations are constitutional on their face, they may be unconstitutional as applied. In *Mercer v. Michigan State Board of Education*,[121] a federal district court upheld a statute prohibiting discussion of birth control in public schools, but stated, "There is no question but that a Constitutional statute may be applied in an unconstitutional manner."[122] In *Shuttlesworth v. City of Birmingham*,[123] the United States Supreme Court stated, "As so construed, we cannot say that the [loitering] ordinance is unconstitutional [on its face], though it requires no great feat of imagination to envisage situations in which such an ordinance might be unconstitutionally applied."[124]

No great feat is required to imagine unconstitutional applications of the Hatch Amendment. Such applications are occurring throughout the nation's public schools.[125] The Hatch Amendment was designed to prevent invasions of students' privacy. Since the new regulations were issued by the Education Department in 1984, however, certain parent and "concerned citizen" groups have attempted to misapply the statute. These groups are trying to remove entire courses of studies or are protesting the use of materials, activities, and tests in non-federally funded courses such as health and physical education, sociology, and literature.[126] The Hatch Amendment was intended to apply only to specific activities.[127]

In Hillsboro, Missouri, a group called Parents Who Care for Basic Skills, Inc. was using a state law providing that Missouri will comply

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[117]*See supra* note 103 and accompanying text.

[118]*See supra* note 97 and accompanying text.

[119]*See supra* note 98 and accompanying text.

[120]*See supra* note 92 and accompanying text.

[121]379 F. Supp. 580 (E.D. Mich.), *aff'd*, 419 U.S. 1081 (1974).

[122]*Id.* at 586.

[123]382 U.S. 87 (1965).

[124]*Id.* at 91.

[125]*See infra* notes 127-34 and accompanying text.

[126]*See, e.g.*, Fiske, *supra* note 97; *Walt Disney a Menace*? *NEA Today* (April 7, 1985) at 6, col. 2 [hereinafter cited as *Walt Disney*]; Wall, *A New Right Tool Distorts Regulations* (editorial) *Christian Century* (April 24, 1985) at 403, col. 1; People for the American Way, *Hatch Amendment Fact Sheet*, Washington D.C. [hereinafter cited as *Hatch Amendment Fact Sheet*].

[127]*See supra* notes 11, 52 and 82.

with the federal Hatch Amendment, to protest state-mandated sex education courses, writing exercises, counseling programs, and some books and movies, including "Romeo and Juliet" and Walt Disney's PG-rated "Never Cry Wolf."[128] The suit petitioned for a declaratory judgment as to whether the Missouri statute, incorporating the Hatch Amendment by reference though not expanding its substance, extended to activities in the Hillsboro school district that were not federally funded. The Jefferson County Circuit Court dismissed the suit without deciding the case on its merits.[129]

The Hatch Amendment would not have applied in the Hillsboro situation for numerous reasons. First, the counseling programs, the showing of the Walt Disney film, and the sex education course were not federally funded.[130] The Hatch Amendment only applies to activities funded by the Department of Education. Second, the sex education courses were state-mandated,[131] and only state or local authorities may determine public school curriculum.[132] Third, the Walt Disney film was shown after school as an extracurricular activity,[133] and thus, students were not to required to attend.

Similar misapplications of the Hatch Amendment have occurred throughout the country:

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[128]The Missouri statute is Mo. ANN. STAT. §167.113 (Supp. 1985-86) which provides: "The State of Missouri shall comply with all the provisions of the federal law relating to the protection of pupil rights, as contained in section 1232h(b) of Title 20 United States Code." "Never Cry Wolf" is a 1973 Walt Disney film focusing on a young biologist, wolves, and Inuits. *Walt Disney*, *supra* note 126. *See also* Fiske, *supra* note 97; Chollett, *Parents Group in Hillsboro Sues School District Over Curriculum*, St. Louis Post-Dispatch (May 11, 1985) at 4A, col. 2.

[129]Parents Who Care for Basic Skills, Inc., v. Walker, No. CU 185-1745 (Jefferson County Cir. Ct., Missouri) (dismissed Nov. 20, 1985); *see also* Bridgeman, *Bills Patterned After Federal Hatch Act Pressed in States to Spur Discussion*, EDUCATION WEEK, 1 (May 29, 1985).

[130]*See* Condon, *Hillsboro School Board Ends Dispute*, St. Louis Globe Democrat (March 12, 1985) at 6A, col. 2; *see also* Cholett, *supra* note 128.

[131]Condon, *supra* note 130; Bridgeman, *supra* note 129. at 19.

[132]*See*, *e.g.*, Board of Educ. v. Pico, 457 U.S. 853, 864 (1982); Russo v. Central School Dist. No. 1, 469 F.2d 623, 633 (2d Cir. 1972), *cert. denied*, 411 U.S. 932 (1973); *see also* 20 U.S.C. § 1232a (Supp. 1985).

[133]*Walt Disney*, *supra* note 126. As a result of objections to Shakespeare's "Romeo & Juliet," one major publisher recently printed an edition without any reference to the couple's love affair and suicide. This was in response to pressure from parents who claim that such literature may be partially responsible for the increased rate of suicide in school-age children. Senator Hatch disapproved of this "emasculating of Shakespeare" because students could watch murder, rape, suicide, and infidelity on television at almost any time. 131 CONG. REC. S1390 (daily ed. Feb. 19, 1985) (statement of Sen. Hatch).

— *Grand Island, New York* — The Hatch Amendment was used to prevent adding a citizenship program to the curriculum.[134]

— *Arlington, Virginia* — A "pressure" group has alleged that classroom discussions of sex and nuclear war violate the Hatch Amendment.[135]

— *Lincoln County, Oregon* — The entire guidance and counseling program was removed because of allegations that it violated the Hatch Amendment.[136]

— *Gallipolis, Ohio* — Parents objected to a voluntary drug and alcohol abuse course which allegedly "teaches values clarification"[137] in violation of the Hatch Amendment.[138]

— *Manchester, Connecticut* — A parent group, Concerned Citizens of Manchester, is using the Hatch Amendment to protest mandatory health courses in junior high schools because topics covered in the class include sex, birth control, suicide, and abortion.[139]

— *Boonville, Indiana* — In a junior high school physical education class, there were objections to the showing of a film describing yoga as a form of exercise. "Spiritual awareness" and "promotion of Hinduism" supposedly violates the Hatch Amendment.[140]

— *Glendive, Montana* — Concerned Parents for Children objected to sex education, abortion, and values discussed in textbooks and home economics courses in high school.[141]

Another group in Chevy Chase, Maryland, the Maryland Coalition of Concerned Parents for Privacy Rights in Public Schools, has distributed about 250,000 copies of a form letter to parents throughout the country urging them to write to their local school boards.[142] The form letter demands that schools obtain parental consent in accordance with the Hatch Amendment before children participate in *any of thirty-four class-*

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[134]Fiske, *supra* note 97.

[135]*Hatch Amendment Fact Sheet*, *supra* note 126, at 2.

[136]*Id.*

[137]Values clarification is supposedly a form of psychological treatment. Chollett, *supra* note 128.

[138]*Hatch Amendment Fact Sheet*, *supra* note 126, at 2.

[139]*Id.* at 3.

[140]*Id.*

[141]*Id.*

[142]*Walt Disney*, *supra* note 126; Tugend, *Bennett Clarifies Intent of Hatch Amendment*, EDUCATION WEEK, 19 (May 8, 1985).

room activities including: discussions of abortion, nuclear war, suicide, and the roles of men and women.[143] These examples illustrate how groups are attempting to apply the Hatch Amendment in ways quite distinct from its stated purpose. Such misapplications lead to constitutional problems because they disregard academic freedom in the schools,[144] affect curriculum,[145] restrict teachers' and students' rights to disseminate and receive information,[146] and curtail the school's function as a "marketplace of ideas."[147]

Academic freedom is a "special concern of the First Amendment"[148] and furthers the educational goal of developing students' thinking ability. Although the Supreme Court in *Keyishian v. Board of Regents*[149] discussed academic freedom in the university or college setting, lower courts have subsequently applied the rationale to secondary education.[150] In *Albaum v. Carey*,[151] the federal district court supported academic freedom in secondary schools and stated, "[E]ven those who go on to higher education will have acquired most of their working and thinking habits in grade and high school."[152] In a case involving high school teachers' rights to select teaching materials for elective courses in the eleventh and twelfth grades,[153] the court stated:

> For many people, the formal educational experience ends with high school. To restrict the opportunity for involvement in an open forum for the free exchange of ideas to higher education would not only foster an unacceptable elitism, it would also fail to complete the development of those not going on to college, contrary to our constitutional commitment to equal opportunity. . . . [I]t would be inappropriate to conclude that academic freedom is required only in the colleges and universities.[154]

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[143]Eagle Forum, *Eagle Forum Newsletter* (January 1985).

[144]*See infra* notes 148-55 and accompanying text.

[145]*See infra* notes 156-63 and accompanying text.

[146]*See infra* notes 164-75 and accompanying text.

[147]*See infra* notes 176-84 and accompanying text.

[148]*See* Keyishian v. Board of Regents, 385 U.S. 589, 604 (1967).

[149]385 U.S. 589 (1967).

[150]*See, e.g.*, Cary v. Board of Educ., 427 F. Supp 945, 953 (D. Supp. Colo. 1977), *aff'd on other grounds*, 598 F.2d 535 (10th Cir. 1979); *see also* Webb v. Lake Mills Community School Dist., 344 F. Supp. 791, 799 (N.D. Iowa 1972) (Keyishian rationale of academic freedom extends to high school and elementary school teachers).

[151]283 F. Supp. 3 (E.D. N.Y. 1968) (high school teacher's challenge to the constitutionality of a New York education law giving the school superintendent complete discretion in recommending probationary teachers for tenure).

[152]*Id.* at 10.

[153]Cary v. Board of Educ., 427 F. Supp. 945.

[154]*Id.* at 953.

Applying the Hatch Amendment to preclude classroom discussion of controversial topics such as sex, birth control, suicide, abortion, or nuclear war is contrary to the Supreme Court position that "students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding."[155] Denying students the opportunity to consider sensitive or unsettled issues in supervised classroom discussion may restrain the students' intellectual development.[156] By discussing controversial or unsettled topics in a supervised classroom environment, teachers have the opportunity to help students analyze, investigate, and consider the various merits of each issue.[157] Teachers may also help the students to keep an open mind about differing positions and to draw thoughtful conclusions.[158]

Using the Hatch Amendment to protest various courses or classroom discussion of controversial topics is harmful to education in another aspect. Constant fear that a certain discussion or activity might violate the Hatch Amendment or the regulations may eventually chill a teacher's desire to try new and different ideas.[159] As a result, traditional and probably less stimulating discussions and activities will replace more imaginative or creative and probably intellectually more challenging ones.[160]

In a case in which the Supreme Court prohibited the use of loyalty oaths by an Oklahoma college,[161] Justice Frankfurter described teachers from primary grades to the university, as "priests of our democracy."[162] Justice Frankfurter believed teachers should not be forced to teach in an atmosphere unconducive to openmindedness and free inquiry. Repeated attempts to invoke the Hatch Amendment to remove or protest various courses or classroom discussions create such an undesirable atmosphere.

Using the Hatch Amendment to remove certain courses or topics of discussion from classes also infringes on students' first amendment rights. In *Tinker v. Des Moines Independent Community School District*,[163] a case involving high school students who were suspended for

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[155]Keyishian, 385 U.S. at 603 (quoting Sweezy v. New Hampshire, 354 U.S. 234, 250 (1957)).

[156]Nahmod, *Controversy in the Classroom: The High School Teacher and Freedom of Expression*, 39 GEO. WASH. L. REV. 1032 (1971). Nahmod also suggests the possibility of harmful emotional impact later when the student encounters the controversial or sensitive ideas in an uncontrolled environment. *Id.* at 1054.

[157]*Id.* at 1054 n.94 (citing American Civil Liberties Union, *Academic Freedom in the Secondary Schools* 8 (1968).

[158]*Id.*

[159]*See supra* notes 110-11 and accompanying text.

[160]Lynn, *supra* note 18, at 8.

[161]Wieman v. Updegraff, 344 U.S. 183, 195 (1952).

[162]*Id.* at 196.

[163]393 U.S. 503 (1969).

wearing black armbands to school to protest the Vietnam War, the Supreme Court stated that students and teachers have first amendment rights to freedom of speech and expression which they do not "shed at the schoolhouse gate."[164] That has been the "unmistakable holding" of the Supreme Court for more than sixty years.[165] In a plurality opinion, the Supreme Court acknowledged that the first amendment not only fosters individual self expression, but also plays a role " 'in affording the public access to discussion, debate, and the dissemination of information and ideas.' "[166]

The first amendment guarantees to students the right to receive information in two ways. First, the receiver's right to receive flows directly from the sender's right to send.[167] Students have a first amendment right to receive information because their teachers' freedom of expression is protected.[168] The Supreme Court has recognized that "[t]he dissemination of ideas can accomplish nothing if otherwise willing addressees are not free to receive and consider them. It would be a barren marketplace of ideas that had only sellers and no buyers."[169] Second, students are guaranteed the right to receive information because this right is a "necessary predicate" to the students' own constitutional right of free speech and expression.[170] Therefore, students' first amendment rights should prevent the application of the Hatch Amendment to limit classroom discussion.

In *Keefe v. Geanakos*,[171] some parents were offended when a high school teacher used a slang term for an incestuous son during a classroom discussion.[172] The United States Court of Appeals for the First Circuit acknowledged that the word was known to many students in their last year of high school but that some parents were still offended. The Court of Appeals upheld the use of the word by the teacher and stated, "[W]ith the greatest of respect to [the offended] parents, their sensibilities are not the full measure of what is proper education."[173] High school students are not "devoid of all discrimination or resistance."[174]

Closely connected to students' first amendment rights is the concept

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[164]*Id.* at 506.

[165]*Id.*

[166]Board of Educ. v. Pico, 457 U.S. at 866 (quoting First National Bank of Boston v. Bellotti, 435 U.S. 765 (1978)).

[167]*Id.* at 867 (citing Martin v. Struthers, 319 U.S. 141 (1943)).

[168]*See Tinker*, 393 U.S. at 506.

[169]Board of Educ. v. Pico, 457 U.S. at 867 (quoting Lamont v. Postmaster General, 381 U.S. 301, 308 (1965)).

[170]*Id.*

[171]*Id.* at 361-62.

[172]The word was "motherfucker." *Id.* at 361.

[173]*Id.* at 361-362.

[174]*Id.* at 362.

of secondary schools as marketplaces of ideas.[175] Exposure to different ideas and viewpoints stimulates, challenges, and develops a student's intellectual ability. In *Right to Read Defense Committee v. School Committee*,[176] a Massachusetts school board had removed an anthology from a high school library because of offensive language and the theme of one poem. The federal district court recognized the right to read and to be exposed to controversial thoughts and language as "a valuable right subject to First Amendment protection"[177] and enjoined the school board's removal of the book.

In a more recent case involving the removal of nine books from a high school library, *Board of Education v. Pico*,[178] the Supreme Court stated that access to a wide variety of ideas "prepares students for active and effective participation in the pluralistic, often contentious society in which they will soon be adult members."[179] In *Pico*, the Court looked to the underlying motives for the removal of the books and said the school board could not remove the books simply because its members dislike the ideas contained in them.[180] The Constitution does not permit the official suppression of ideas.[181] Even Chief Justice Burger, dissenting from the plurality opinion, agreed that "as a matter of *educational policy* students should have wide access to information and ideas."[182]

If the Hatch Amendment is applied to limit discussions of sex education, health courses covering birth control and abortion, curricula pertaining to drugs and alcohol, or discussions of death and suicide, then the amendment would be used to prescribe orthodoxy in education. The first amendment " 'does not tolerate laws that cast a pall of orthodoxy over the classroom.' "[183]

Parent groups attempting to restrict classroom discussion of certain controversial subjects conflict not only with the rights and interests of students and teachers, but also with the rights and interests of other

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[175] *See supra* notes 53-60 and accompanying text.

[176] 454 F. Supp. 703 (D. Mass. 1978).

[177] *Id.* at 714.

[178] 457 U.S. 853 (1982). The nine books were: *Slaughter House Five*, by Kurt Vonnegut, Jr.; *The Naked Ape*, by Desmond Morris; *Down These Mean Streets*, by Piri Thomas; *Best Short Stories of Negro Writers*, edited by Langston Hughes; *Go Ask Alice*, of anonymous authorship; *Laughing Boy*, by Oliver LaFarge; *Black Boy*, by Richard Wright; *A Hero Ain't Nothin But A Sandwich*, by Alice Childress; and *Soul On Ice*, by Eldridge Cleaver. *Id.* at 856, n.3. The school board characterized the books as " 'anti-American, anti-Christian, anti-Sem[i]tic, and just plain filthy.' " *Id.* at 857.

[179] *Id.* at 868.

[180] *Id.* at 872.

[181] *Id.*

[182] *Id.* at 891.

[183] Board of Educ. v. Pico, 457 U.S. at 870 (quoting Keyishian v. Board of Regents, 385 U.S. 589, 603 (1967)).

parents.[184] When a parent or a parent group attempts to control the education of its own children, this action indirectly affects the education of other students. The parents of these other students may want their children to have exposure to these ideas. Consequently, parents or parent groups usually are more successful when they seek to excuse a child from participation in a discussion or activity rather than attempt to change the curriculum.[185] State and local school boards, alone, and not parents or parent groups, have the authority to choose the curricula and academic materials used in the public schools.[186] Parent groups should not "torture the intent"[187] of the Hatch Amendment and Education Department regulations by attempting to apply them unconstitutionally to protest various school curricula.

IV. Resolving the Controversy

There are three possible solutions to the controversy concerning the scope and applicability of the Hatch Amendment and the regulations. The most logical and desirable solution is to repeal the amendment. Congress passed the Hatch Amendment because the Department of Education was funding controversial psychological research and testing programs in schools and parents expressed concern about their children's education. The Hatch Amendment is no longer necessary because most school districts have formal guidelines allowing parents to examine materials and procedures to resolve complaints about the instructional program.[188] Schools now also routinely obtain parental permission before administering any type of psychological test to students.[189] These procedures safeguard both students' and parents' rights.

Repealing the Hatch Amendment would return control of the schools to state and local school authorities where such control properly belongs. The Supreme Court has long recognized that the states and local school boards have broad discretion and authority in managing school affairs and controlling conduct in the schools.[190] Forcing the Department of

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[184]Comment, *Discussion, supra* note 4, at 975.

[185]*Id.* at 976.

[186]*Id.* at 976. Even the State and local school boards must exercise this authority within limits of the first amendment. *Id.* at 967; *see also* Tinker v. Des Moines Indep. Community School Dist. 393 U.S. 503, 511 (1969).

[187]131 Cong. Rec. S1390 (daily ed. Feb. 19, 1985) (statement of Sen. Hatch).

[188]Lewis, *supra* note 19 at 668; Bridgeman, *supra* note 128, at 19; *see also Transcript, supra* note 17, at 9 (Sam Sava, Ph.D., Executive Director of National Association of Elementary School Principals, agrees that Hatch Amendment is not needed because "due processes established at the local level [are able] to deal with the issues.").

[189]Civil Rights, *supra* note 86, at 2.

[190]Board of Educ. v. Pico, 457 U.S. 853, 863-64; Tinker v. Des Moines Indep. Community School Dist., 393 U.S. 503, 507; Meyer v. Nebraska, 262 U.S. 390, 402 (1923).

Education to resolve local school disputes promotes neither the best interests of education nor government efficiency. Good education or an effective school system starts at the bottom and requires local guidance and community support rather than federal intervention.[191]

If the Hatch Amendment is not repealed, then issuing new regulations to prevent future abuse of the amendment is the next best solution. The controversy surrounding the Hatch Amendment resulted from the vague 1984 regulations which enabled various groups to attempt to affect local school curricula. One group's leader has admitted that her group is trying to extend the law beyond its letter.[192]

Between 1980 and 1984, when the original regulations were in effect, only twelve to fourteen complaints were filed with the Department of Education.[193] In less than one year after the 1984 regulations became effective, the Department of Education had already reviewed six complaints and had received four other letters stating the intent to file a complaint.[194] New regulations could clarify the intent of the Hatch Amendment.

Furthermore, the Department of Education could narrow the definitions of psychiatric and psychological examination, testing, and treatment to bring them more in line with the professional educational community's understanding of these terms — meaning the standard personality, reasoning, and achievement tests. A new set of regulations could also explain how to determine the "primary purpose" of a psychiatric or psychological activity, whether a classroom activity is "directly related to academic instruction," and whether the teacher, the local school board, or the Department of Education will determine the nature of a school program. Tighter regulations would keep federal involvement in local disputes to a necessary minimum and prevent much of the "widespread misunderstanding"[195] and attempted abuse of the Hatch Amendment.

The third and least desirable solution, favored by Senator Hatch,[196] is to let the courts decide the applicability of the amendment and the regulations to various school activities and curricula. Court intervention is undesirable because establishing and maintaining a curriculum appropriate to a particular community's values is best entrusted to local school authorities.[197] The United States Supreme Court acknowledges that "fed-

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[191]*See* Doyle and Hartle, *The White House in The School House*, The Washington Post, (May 20, 1985) at 13A, col. 3.

[192]Fiske, *supra* note 98.

[193]GUIDELINES, *supra* note 15, at 26.

[194]Riley, *supra* note 21, at 5, 7.

[195]Tugend, *supra* note 142, at 12.

[196]Fiske, *supra* note 98.

[197]Board of Educ. v. Pico, 457 U.S. at 864.

eral courts should not ordinarily 'intervene in the resolution of conflicts which arise in the daily operation of school systems.' "[198] Local school boards by their very nature and relationship with the community are best suited to resolve local education disputes in a timely and equitable manner. The courts' task never has been, nor ever will be, to plan daily lessons or approve curriculum in the schools.

V. Conclusion

Attempted misapplications of the Hatch Amendment and its regulations have harmed the entire educational system. Valuable time, energy, and resources of both teachers and local school boards, which should have been spent improving the education offered to students, instead have been wasted battling meritless claims of violations of vague regulations to an unnecessary federal amendment. Teachers and school officials alike admit that the very presence in the community of groups threatening to run to the Department of Education with an alleged violation of the Hatch Amendment has forced a change in school curriculum and teaching methods used.[199] The ultimate harm of the abuse of the Hatch Amendment is to the education of school children who no longer are allowed to discuss their opinions or make judgments about controversial or unsettled issues in the classroom.

The time has come to halt the attack on the nation's schools resulting from the Education Department's 1984 regulations implementing the Hatch Amendment, and, as Senator Hatch himself stated, "let the rule of commonsense prevail."[200]

Paul D. Fredrick

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[198] *Id.* (quoting Epperson v. Arkansas, 393 U.S. 97, 104 (1968)).

[199] Richburg, *supra* note 16.

[200] 131 Cong. Rec. S1390 (daily ed. Feb. 19, 1985) (statement of Sen. Hatch).

Oral Contraceptives: Heading Into an Era of Unpredictability, Unlimited Liability, and Unavailability?

I. Introduction

Technological advances have placed modern man in a precarious position. Now, more than ever, man is capable of creating and producing materials suited to solve the problems of the world, yet these beneficial products frequently bear concomitant hazards which cannot be avoided; that is, "some products . . . are quite incapable of being made safe for their intended and ordinary use."[1] However, general tort principles indicate that manufacturers of such products will bear no liability if their product is properly manufactured and accompanied by adequate directions and warnings.[2] Consequently, the manufacturer of any product it knows or should know is dangerous bears an unquestioned duty to warn the product's consumer of its potential hazards or adverse effects.[3]

Yet, as with many across-the-board rules, this common law duty to warn has its exceptions. For instance, when a manufacturer sells products that are generally used under the supervision of engineers or technicians, the manufacturer fulfills its duty to warn when it supplies adequate warnings and instructions to the supervisory engineers or technicians, rather than the actual user.[4] Similarly, when a manufacturer supplies a product to members of a trade or profession, it bears no duty to warn of hazards generally known to that trade or profession.[5] Nowhere have there been more exceptions to the duty to warn the user than in the area of pharmaceuticals. Beginning in the mid-1960s, courts have almost universally held that manufacturers of prescription drugs have a

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[1] Restatement (Second) of Torts § 402A, comment k (1965).

[2] *Id.* This Restatement comment goes on to emphasize:

> [T]he seller of such products, again with the qualification that they are properly prepared and marketed, and proper warning is given, where the situation calls for it, is not to be held to strict liability for unfortunate consequences attending their use, merely because he has undertaken to supply the public with an apparently useful and desirable product, attended with a known but apparently reasonable risk.

Id.

[3] *See, e.g.*, Illinois State Trust Co. v. Walker Mfg. Co., 73 Ill. App. 3d 585, 589, 392 N.E.2d 70, 73 (1978); Craven v. Niagara Mach. and Tool Works, Inc., 417 N.E.2d 1165, 1169 (Ind. Ct. App. 1981), *rev'd on rehearing on other grounds*, 425 N.E.2d 654 (Ind. Ct. App. 1981); H.P. Hood v. Ford Motor Co., 370 Mass. 69, 75, 345 N.E.2d 683, 688 (1976).

[4] *See* Jacobsen v. Colorado Fuel and Iron Corp., 409 F.2d 1263, 1273 (9th Cir. 1969). *See also* Hopkins v. E.I. DuPont de Nemours & Co., 212 F.2d 623, 626 (3d Cir.), *cert. denied*, 348 U.S. 872 (1954).

[5] *See* Shawver v. Roberts Corp., 90 Wis. 2d 672, 686, 280 N.W.2d 226, 233 (1979).

duty to warn the user's physician, who in turn is required to warn the patient, the user of the drug, of potential adverse effects[6] under the theory of informed consent.[7] This exception to the common law duty to warn is premised on the doctrine of the learned intermediary.[8] According to the learned intermediary doctrine, the physician is viewed as a knowledgeable liaison whose role is to translate warnings provided by the drug's manufacturer into meaningful advice for his patient,[9] the drug's ultimate consumer. However, limitations on the above-cited exceptions to the common law duty to warn the consumer directly were forewarned in the Restatement (Second) of Torts section 388, comment n, which states:

> Giving to the third person through whom the [product] is supplied all the information necessary to its safe use is not in all cases sufficient to relieve the supplier from liability . . . . The question remains whether this method gives reasonable assurance that the information will reach those whose safety depends on their having it . . . .[10]

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[6]*See* Canterbury v. Spence, 464 F.2d 772, 780 (D.C. Cir.), *cert. denied*, 409 U.S. 1064 (1972), where the court first cited Schloendorff v. Society of New York Hospital, 211 N.Y. 125, 129-30, 105 N.E. 92, 93 (1914), *overruled in* Bing v. Thunig, 2 N.Y.2d 656, 143 N.E.2d 3 (1957), for the proposition: " 'Every human being of adult years and sound mind has a right to determine what shall be done with his own body . . . .' " *Id.*

[7]The *Canterbury* court interpreted "informed consent" in the following way:

> True consent to what happens to one's self is the informed exercise of a choice, and that entails an opportunity to evaluate knowledgeably the options available and the risks attendant upon each. The average patient has little or no understanding of the medical arts, and ordinarily has only his physician to whom he can look for enlightenment with which to reach an intelligent decision. From these almost axiomatic considerations springs the need, and in turn the requirement, of a reasonable divulgence by physician to patient to make such a decision possible.

Canterbury, 464 F.2d at 780. *See also* Cobbs v. Grant, 8 Cal. 3d 229, 243, 502 P.2d 1, 9, 104 Cal. Rptr. 505, 513 (1972); Wilkinson v. Vesey, 110 R.I. 606, 624, 295 A.2d 676, 685 (1972). For additional commentary on the development and scope of the "informed consent" doctrine, see Riskin, *Informed Consent: Looking for the Action*, 1975 U. ILL. L.F. 580 (1975); Waltz and Scheuneman, *Informed Consent to Therapy*, 64 NW. U.L. REV. 628 (1970); Comment, *The Evolution of the Doctrine of Informed Consent*, 12 GA. L. REV. 581 (1978).

[8]*See* Sterling Drug, Inc. v. Cornish, 370 F.2d 82, 85 (8th Cir. 1966).

[9]*Id.*

[10]"RESTATEMENT (SECOND) OF TORTS § 388, comment n (1965), continues:

> Many such articles can be made to carry their own message *to the understanding of those who are likely to use them* . . . by a label or other device, indicating with substantial sufficiency their dangerous character. Where the danger involved in the ignorant use of their true quality is great and such means of disclosure are practicable and not unduly burdensome, it may well be that the supplier should be required to adopt them.

Id. (emphasis added).

Accordingly, courts confronted with factual situations in which a manufacturer's warnings to the physician were predictably relayed to the patient-consumer in an "inadequate way"[11] have side-stepped the doctrine of the learned intermediary to impose liability on the manufacturer for its failure to warn the consumer directly.[12]

Judicial reluctance to give recognition to the learned intermediary doctrine, which originally evolved in the area of vaccines,[13] has most recently extended to oral contraceptives.[14] This reaffirmation of the common law duty to warn the consumer directly is not viewed as surprising given the Food and Drug Administration's ("FDA")[15] current requirement of patient package inserts for oral contraceptives.[16] However, in *MacDonald v. Ortho Pharmaceutical Corporation*[17] and two similar cases,[18] the manufacturer of oral contraceptives was held liable for its failure adequately to warn the consumer directly in spite of its compliance with FDA packaging/labeling requirements.[19] These cases present a puzzling question as to how manufacturers are to satisfy their duty to warn the consumer directly in the case of oral contraceptives distributed nationwide in light of the fact that each court held that the adequacy of any given warning must be determined against state negligence law as interpreted by a jury. Yet, because such adequacy standards are never concretely fashioned prior to user injury and have the potential to vary from state to state, oral contraceptive manufacturers held to these standards embark upon an era of certain unpredictability and probable unlimited liability. In addition, an analysis of the reasoning used in these

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[11]In this context, "inadequate way" describes the situation in which a manufacturer's warnings to the physician about a product's potential adverse effects were not, in turn, passed on to the patient in an understandable manner by the physician after an individualized assessment of the risks and benefits. *See* Reyes v. Wyeth Laboratories, 498 F.2d 1264, 1277 (5th Cir.), *cert. denied*, 419 U.S. 1096 (1974).

[12]*See* Givens v. Lederle, 556 F.2d 1341 (5th Cir. 1977); Reyes v. Wyeth Laboratories, 498 F.2d 1264 (5th Cir.), *cert. denied*, 419 U.S. 1096 (1974); Davis v. Wyeth Laboratories, Inc., 399 F.2d 121 (9th Cir. 1968); Odgers v. Ortho Pharmaceutical Corp., 609 F. Supp. 867 (E.D. Mich. 1985); Stephens v. G.D. Searle & Co., 602 F. Supp. 379 (E.D. Mich. 1985); MacDonald v. Ortho Pharmaceutical Corp., 394 Mass. 131, 475 N.E.2d 65, *cert. denied*, 106 S. Ct. 250 (1985).

[13]*See* Reyes v. Wyeth Laboratories, 498 F.2d 1264 (5th Cir.), *cert. denied*, 419 U.S. 1096 (1974); Davis v. Wyeth Laboratories, Inc., 399 F.2d 121 (9th Cir. 1968).

[14]*See* Odgers v. Ortho Pharmaceutical Corp., 609 F. Supp. 867 (E.D. Mich. 1985); Stephens v. G.D. Searle & Co., 602 F. Supp. 379 (E.D. Mich. 1985); MacDonald v. Ortho Pharmaceutical Corp., 394 Mass. 131, 475 N.E.2d 65, *cert. denied*, 106 S. Ct. 250 (1985).

[15]The Food and Drug Administration is the agency of the federal government charged with protecting the public from impure and unsafe drugs.

[16]*See* 21 C.F.R. § 310.501 (1985).

[17]394 Mass. 131, 475 N.E.2d 65 (1985).

[18]*Odgers*, 609 F. Supp. 867; *Stephens*, 602 F. Supp. 379.

[19]*See* 21 C.F.R. 310.501 (1985).

recent cases causes one to ponder the future of the doctrine of the learned intermediary in relation to other prescription drugs.

This Note will initially trace the development of the doctrine of the learned intermediary and the limitations on this doctrine as they first appeared in the area of vaccines. In addition, it will briefly discuss the emergence of the oral contraceptive industry and the public's call for FDA intervention in the labeling of its products. Next, this Note will consider the application of the learned intermediary doctrine in early oral contraceptive cases and its apparent inapplicability in three recent oral contraceptive cases — *McDonald, Odgers,* and *Stephens.* Finally, the Note will explore the potential effects of these latest holdings on the manufacturers of oral contraceptives and the expansion of the *MacDonald* holding to other prescription drugs.

II. The Emergence of the Learned Intermediary Doctrine and Its Early Limitation: The Vaccine Cases

Today it is well established that a prescription drug manufacturer discharges its duty to warn of its product's risks and hazards when it supplies physicians with adequate information about the drug's associated side effects.[20] This general tort principle, now commonly referred to as the doctrine of the learned intermediary, was originally conceived in the case of *Love v. Wolf.*[21]

In *Love*, the California Court of Appeals held that the manufacturer of chloromycitin, an antibiotic used in the treatment of minor ailments, had no specific duty to warn the patient directly.[22] Instead, the manufacturer's common law duty to warn could be discharged through

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[20]*See Reyes*, 498 F.2d 1264, 1276 (5th Cir.) *cert. denied*, 419 U.S. 1096 (1974), where a prescription drug manufacturer's duty to warn was explained as follows:

> [W]here *prescription* drugs are concerned, the manufacturer's duty to warn is limited to an obligation to advise the prescribing physician of any potential dangers that may result from the drug's use . . . . Prescription drugs are likely to be complex medicines, esoteric in formula and varied in effect. As a medical expert, the prescribing physician can take into account the propensities of his patient. His is the task of weighing the benefits of any medication against its potential dangers. The choice he makes is an informed one, an individualized medical judgment bottomed on a knowledge of both patient and palliative.

Id. (emphasis in original). *See also* Mauldin v. Upjohn Co., 697 F.2d 644, 647 (5th Cir.), *cert. denied*, 464 U.S. 848 (1983) (manufacturer of antibiotics not required to warn patient directly if physician adequately warned); Dyer v. Best Pharmaceutical, 118 Ariz. 465, 468, 577 P.2d 1084, 1087 (1978) (manufacturer of pharmaceutical used for anorexiant purposes was under duty to warn the physician only); McKee v. Moore, 648 P.2d 21, 24 (Okla. Sup. Ct. 1982) (IUD manufacturer required to warn physician); Terhune v. A.H. Robins Co., 90 Wash. 2d 9, 13, 577 P.2d 975, 979 (1978) (manufacturer not required to warn IUD wearers directly); Prosser and Keeton, Torts 688 (5th ed. 1984).

[21]226 Cal. App. 2d 378, 38 Cal. Rptr. 183 (1964).

[22]*Id.* at 395, 38 Cal. Rptr. at 193.

adequate warning given to either the physician *or* the patient.[23] Implicit in the *Love* decision was the court's reluctance to impose a direct duty to warn the patient-consumer on manufacturers, which normally have only minimal contact with the ultimate users of the drugs.[24] This mere reluctance of the *Love* court planted the seed that ultimately grew into the learned intermediary doctrine. The term "learned intermediary" was first coined in *Sterling Drugs, Inc. v. Cornish*,[25] when it was applied descriptively to denote the special liaison-like role the physician plays between patient and drug manufacturer. In *Cornish*, the primary issue on review for the Eighth Circuit Court of Appeals was whether the defendant-drug manufacturer had a duty to warn the prescribing physician of recently-discovered side effects of its product, Aralen, an anti-arthritic agent. Affirming the judgment below in favor of a plaintiff who suffered chloroquine retinopathy, a degenerative disease of the eye resulting from ingesting Aralen, the Eighth Circuit Court of Appeals emphatically held that the drug manufacturer did have a duty to warn the physician, a measure which, in the court's opinion, would minimize the number of patients injured by adverse effects.[26] Although the court's discussion of the learned intermediary doctrine was limited to one paragraph, this single phrase became authority for subsequent judicial rulings that a drug manufacturer has a duty to warn only the physician.[27]

From this relatively unnoticed beginning, the doctrine of the learned intermediary emerged as a general tort principle that has been given credence either directly or indirectly in nearly every case in which a plaintiff brought a warning-related action against a prescription drug manufacturer.[28] Although this doctrine has been summarized in almost

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[23] *Id.* Specifically, Presiding Justice Pierce wrote:

> In the case of a drug it has been held there is a duty to exercise reasonable care to warn of potential dangers from use even though the percentage of users who will be injured is not large [citation omitted]. But if adequate warning of potential dangers of a drug has been given to doctors, there is no duty by the drug manufacturers to insure that the warning reaches the doctor's patient for whom the drug is prescribed [citation omitted].

Id.

[24] *Id.* at 394, 38 Cal. Rptr. at 192.

[25] 370 F.2d 82, 85 (1966).

[26] *Id.* In particular, the court described the patient-physician relationship as follows:

> . . . we are dealing with a prescription drug rather than a normal consumer item. In such a case, the purchaser's doctor is a learned intermediary between the purchaser and the manufacturer. If the doctor is properly warned of the possibility of a side effect in some patients, and is advised of the symptoms normally accompanying the side effect, there is an excellent chance that injury to the patient can be avoided. This is particularly true if the injury takes place slowly . . . .

Id.

[27] *See supra* note 20.

[28] *Id.*

as many different ways as the number of courts that have discussed it, the reasons for the learned intermediary doctrine's soundness and broad acceptance are three-fold.[29]

The primary argument in support of limiting a prescription drug manufacturer's duty to warn so as to require only the warning of physicians springs logically from the framework of the patient-physician relationship. When an individual chooses to seek medical care, it is reasonable to assume that he places a great deal of trust in the skill and expertise of his physician.[30] This reliance readily translates into unquestioned compliance with "doctor's orders"; that is, the patient takes the medication the physician selects.[31] Based on this observation of human behavior, proponents of the learned intermediary doctrine view direct warnings to the patient as extraneous materials. Instead, the manufacturer's resources are best directed to the physician, who balances a given medication's risks against its potential benefits to the patient in selecting the optimal drug. In addition, the learned intermediary doctrine is frequently justified on the basis that direct warnings to patients may, in fact, compromise the patient-physician relationship and thereby actually endanger the patient's health.[32] A patient's first opportunity to read the manufacturer's information detailing a given drug's adverse effects might well occur outside the supervision of the prescribing physician. Intimidated by potential unpleasant consequences and perhaps confused by technical terminology, some patients might forego treatment but avoid informing the prescribing physician in an attempt to bypass an imagined confrontation. As a result, the patient could go for months without receiving any therapy for an ailment which otherwise could be treated virtually risk-free.[33]

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[29]*See* Carmichael v. Reitz, 17 Cal. App. 3d 958, 989, 95 Cal. Rptr. 381, 399 (1971); Terhune v. A.H. Robins Co., 90 Wash. 2d 9, 14, 577 P.2d 975, 978 (1978).

[30]*See* Carmichael v. Reitz, 17 Cal. App. 3d 958, 989, 95 Cal. Rptr. 381, 399 (1971); Seley v. G.D. Searle & Co., 67 Ohio St. 2d 192, 203, 423 N.E.2d 831, 840 (1981); Terhune v. A.H. Robins Co., 90 Wash. 2d 9, 14, 577 P.2d 975, 978 (1978).

[31]*See Carmichael*, 17 Cal. App. 3d at 989, 95 Cal. Rptr. at 399; *Seley*, 67 Ohio St. 2d at 203, 423 N.E.2d at 840; *Terhune*, 90 Wash. 2d at 14, 577 P.2d at 978.

[32]Carmichael v. Reitz, 17 Cal. App. 3d 958, 989, 95 Cal. Rptr. 381, 400; Curran, *Package Inserts for Patients: Informed Consent in the 1980's*, 305 NEW ENG. MED. J. 1564, 1570 (1981); Rheingold, *Products Liability — The Ethical Drug Manufacturer's Liability*, 18 RUTGERS L. REV. 947, 987 (1964).

[33]*Carmichael*, 17 Cal. App. 3d at 989, 95 Cal. Rptr. at 400. In *Carmichael*, the plaintiff suffered both pulmonary embolisms and thrombophlebitis as a result of ingesting Enovid, a product of defendant Searle, for a period of approximately one year. At trial, the treating physician testified that he had informed the plaintiff that "breakthrough bleeding, nausea and vomiting" were potential side effects of Enovid, but no warning of risk of thromboembolic disease was ever given. *Id.* at 972, 95 Cal. Rptr. at 388. In fact, the physician testified that although he had read product literature on Enovid, he was unaware of a causal relationship between thromboembolic disease and the use of Enovid. *Id.* at 973, 95 Cal. Rptr. at 388-89.

Lastly, the learned intermediary doctrine is often supported by an argument based purely on logistics. It has been asserted that direct communication between drug manufacturer and patient is "difficult if not virtually impossible."[34] This argument is premised on the fact that, at the time of the learned intermediary doctrine's inception, a one-on-one contact between manufacturer and the ultimate consumer was limited. At this time, magazines and television had yet to assume their function as disseminators of medical information.[35]

Although the learned intermediary doctrine has been widely accepted, it is not without its limitations. In fact, only two years after the court in *Sterling Drug, Inc. v. Cornish* first articulated the phrase "learned intermediary,"[36] the Ninth Circuit Court of Appeals in *Davis v. Wyeth Laboratories*[37] determined that certain circumstances surrounding a prescription drug's administration could bar application of the doctrine.

In *Davis*, the plaintiff appealed a jury's verdict in favor of the defendant-manufacturer in a suit brought after he contracted polio as a result of vaccination with the manufacturer's product at a mass immunization clinic.[38] A representative of the manufacturer had supplied detailed instructions and warnings to those in charge of the immunization program, yet no materials concerning adverse effects reached either the vaccines' actual administrator or those who received the vaccines.[39] On the contrary, the plaintiff testified that those materials provided implied "that it was his civic duty to participate."[40]

After noting that "[o]rdinarily in the case of prescription drugs warning to the prescribing physician is sufficient," the Ninth Circuit Court of Appeals held that, because of the particular circumstances surrounding mass immunization programs, the judicially-created learned intermediary doctrine was clearly inapplicable to that case.[41] Therefore, the court revitalized the common law duty to warn the consumer directly.

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[34]Rheingold, *Products Liability — The Ethical Drug Manufacturer's Liability*, 18 RUTGERS L. REV. 947, 987 (1964). *See also Carmichael*, 17 Cal. App. 3d at 989, 95 Cal. Rptr. at 400 (quoting *Rheingold*); *Terhune*, 90 Wash. 2d at 14, 577 P.2d at 978.

[35]*See* Hayes, *Consumer Advertising of Prescription Drugs*, PA. MED., Dec., 1983, at 50; *Direct to Consumer Advertising of Prescription Drugs*, AM. PHARMACY, Feb., 1984, at 20; *Advertising and Ethics: Prescription Drugs on TV*, HOSP. PRAC., Oct., 1983, at 13.

[36]370 F.2d at 85.

[37]399 F.2d 121 (9th Cir. 1968), *cert. denied*, 419 U.S. 1096 (1974).

[38]*Id.* at 122.

[39]*Id.* at 125.

[40]*Id.*

[41]*Id.* at 130. Specifically, the *Davis* court said:

> [A]lthough the drug [polio vaccine] was denominated as a prescription drug, it was not dispensed as such. It was dispensed to all comers . . . (as in the case of over-the-counter sales of non-prescription drugs) . . . .

Id. at 131 (footnote omitted).

Two factors — the lack of a physician's individualized analysis of the vaccine's risks/benefits for each recipient and the decrease in the physician's role in the choice of whether to vaccinate or not[42] — appeared to be paramount in the court's ultimate decision.

Similarly, six years later, the learned intermediary doctrine was ruled inapplicable in *Reyes v. Wyeth Laboratories*,[43] another immunization case. Like *Davis*, the injured party, the eight-month-old daughter of the plaintiff, had contracted polio after receiving the defendant-manufacturer's product at a local department of health clinic.[44] In *Reyes*, the vaccine had been administered by a registered nurse; no doctors were present.[45] Each ten-dose package contained a circular provided by Wyeth which was intended to warn doctors, hospitals, or other purchasers of potential dangers in ingesting the vaccine, but the consent form signed by the patient's mother immediately prior to vaccination contained "no warning of any sort."[46]

While the *Reyes* court readily recognized the drug manufacturer's duty to warn only physicians in customary prescription drug cases,[47] it cited *Davis v. Wyeth Laboratories* and imposed a duty to warn the consumer directly when the manufacturer's product is "dispensed without the sort of individualized medical balancing of the risks to the vaccinee that is contemplated by the prescription drug exception."[48] Of primary importance to the *Reyes* court was the fact that Wyeth Laboratories knew or should have known that its vaccines were frequently administered in mass immunization settings or at rural health departments, environments where patients would receive the product without the individualized care of a physician.[49] Once a manufacturer possessed such knowledge, either actually or constructively, it could no longer rely on warnings given to the physician. At that point, the manufacturer would have to warn all foreseeable users or make certain that such users are warned by the vaccines' administrators.[50]

Subsequent to *Davis* and *Reyes*, the learned intermediary doctrine was frequently held to be inapplicable in immunization cases even when the vaccine was given in a private physician's office rather than in a mass setting.[51] The applicability of the learned intermediary doctrine

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[42] *Id.*

[43] 498 F.2d 1264 (5th Cir. 1974).

[44] *Id.* at 1270.

[45] *Id.*

[46] *Id.*

[47] *Id.* at 1276.

[48] *Id.* at 1277.

[49] *Id.*

[50] *Id.*

[51] *E.g.*, Givens v. Lederle, 556 F.2d 1341 (5th Cir. 1979); Williams v. Lederle Laboratories, 591 F. Supp. 381 (S.D. Ohio 1984).

underwent constant refinement in the area of immunizations until the question most recently determinative of this issue was "whether the drug is commonly administered without individualized balancing by a physician of the risks involved and the individual's needs and circumstances."[52] However, such a test had never been applied to manufacturers of prescription drugs outside the class of immunizations.

III. The Public's Demand for FDA Intervention in the Area of Oral Contraceptives and the FDA's Response

While battles over the manufacturer's duty to warn the consumer directly were waged on the immunization front, other segments of the pharmaceutical industry were preparing to produce "The Pill."[53] G.D. Searle & Company became the first manufacturer to receive FDA approval for the marketing of an oral contraceptive, Enovid, in June, 1960.[54] Almost immediately after Enovid hit the marketplace, the FDA began receiving reports of increased incidence of thromboembolic disease in patients ingesting this oral contraceptive.[55] Sparked by increasing concern within the public sector, the FDA sponsored a committee to research the link between the use of Enovid and thromboembolic disease.[56] In 1963, this link was reported to be insignificant.[57]

In April, 1965, the FDA approved the marketing of two sequential birth control pills, a development that significantly sped up the nation's race to get on the pill.[58] By 1965, the estimated number of oral contraceptive users tallied over five million women.[59] The numbers of new

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[52] *Williams*, 591 F. Supp. at 389 (S.D. Ohio 1984).

[53] The term, "The Pill," has been freely used in a generic sense in societal conversation to denote oral contraceptives.

[54] *Hearings on Present Status of Competition in the Pharmaceutical Industry Before the Subcomm. on Monopoly of the Senate Comm. on Small Business*, 91st Cong., 2d Sess., 6787 (1970) [hereinafter referred to as the *Nelson Comm. Hearings*].

[55] *Id.* at 6787, 7235, 7237. Thromboembolic disease is a generic classification for the occlusion or obstruction of a blood vessel by blood clots dislodged from a vein. Stedman's Medical Dictionary 1295 (22d ed. 1972).

[56] *Nelson Committee Hearings*, *supra* note 54, at 6787.

[57] *Id.*

[58] *Id.* Sequential birth control pills consist of 15 tablets containing estrogen, followed by five tablets containing a proportioned mixture of estrogen and a progesterone; such a regiment is thought to simulate a woman's natural cycle. Davis & Fugo, Drugs of Choice 618 (1968-69). It should be noted that sequential birth control pills are currently not marketed in the United States. 43 Fed. Reg. 4218 (1978). Oral contraceptives frequently prescribed today contain low doses of both estrogen and progesterone (50 micrograms estrogen and less than 1.5 miligrams progesterone); such low-dose oral contraceptives are purported to be as effective and safer than earlier preparations. Lia, *Clinical Pharmacology and Common Minor Side Effects of Oral Contraceptives*, 24 Clinical Obstetrics and Gynecology 879 (1981). Langone, *At Last, Good News About The Pill*, Discover, Feb. 16, 1985, at 8.

[59] *Nelson Comm. Hearings*, *supra* note 54, at 6787. This number had increased by 150% by 1969. *Id.*

prescriptions mounted daily as women were induced to demand the pill by manufacturers' overzealous marketing[60] and comforting articles appearing in widely-read women's periodicals.[61] Although no federal funds were directly allocated to study reported side effects,[62] the FDA did establish an Advisory Committee on Obstetrics and Gynecology to consider all of the available evidence and provide the FDA with adequate scientific evidence relating to the connection between oral contraceptives and health problems. Once again, the government committee found no association between the pill and reported ill effects.[63] The committee did, however, make strong recommendations for measures aimed at keeping a closer surveillance on reports of thromboembolic disease among pill users, expanding studies on the laboratory level, encouraging uniform labeling of oral contraceptives, and expediting approval of low dosage products.[64]

By early 1968, the recommended surveillance system was implemented and the FDA was receiving mounting reports of thromboembolic incidents among pill users.[65] Almost simultaneously, British epidemiological researchers published the results of a study, the Vessey report, in which an undeniable link between oral contraceptives and thromboembolic disease had surfaced.[66] Specifically, the Vessey report indicated that women using oral contraceptives required hospitalization for thromboembolic disease nine times more frequently than women who did not use the pill.[67] In light of the concrete evidence presented in the Vessey report, the FDA was compelled to issue its first warning of potential adverse effects from oral contraceptives in June, 1968.[68]

As the number of oral contraceptive users increased, so did the number of deaths and permanent disabilities resulting from the pill's

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[60] *Id.* at 6788.

[61] *See, e.g.*, Hellman, *Doctor's View of Birth Control Pills*, REDBOOK, April, 1969, at 132; Langmyhr, *How Safe is the Pill?*, PARENT'S MAGAZINE, Oct., 1967, at 58.

[62] *See* Mintz, "THE PILL": AN ALARMING REPORT 53 (1969).

[63] *Id.*

[64] *Id.*

[65] *Id.*

[66] *See* Vessey and Doll, *Investigation of Relation Between Use of Oral Contraceptives and Thromboembolic Disease*, BRITISH MED. J., Apr. 27, 1968, at 199 [hereinafter referred to as the Vessey Report].

[67] *Id.* at 205.

[68] *Nelson Comm. Hearings*, *supra* note 54, at 7022. This initial warning took the form of a "Dear Doctor" letter. *Id.* "Dear Doctor" letters are mass-produced form letters published by either a drug manufacturer or the FDA. "Dear Doctor" letters have generally been scorned as an ineffective means of communicating warnings relating to adverse effects because their use has not been restricted to this purpose; rather, they are also frequently used as promotional materials. As a result, "Dear Doctor" letters run the risk of being deficient in giving an adequate warning. Note, *Liability of Birth Control Pill Manufacturers*, 23 HASTINGS L.J. 1526, 1536 (1972).

ingestion.[69] During the period of July 1 to December 31, 1969, the FDA surveillance system documented fifteen fatalities and twenty-eight non-fatal thromboembolic incidents unquestionably attributable to the pill.[70] By the close of 1969, over three hundred lawsuits had been filed against oral contraceptive manufacturers.[71] Nevertheless, a Gallup poll conducted in February, 1970, revealed startling results: two thirds of the women surveyed had "never been told about possible hazards by their physicians."[72]

Intensification of the public's concern about the risk associated with the use of oral contraceptives induced Senator Gaylord Nelson to hold public hearings on the use and hazards of birth control pills.[73] Shocked by the inadequacy of information being given to oral contraceptive users, the FDA announced on the last day of the Nelson hearings that in the future it would require oral contraceptive manufacturers to include a uniform-content leaflet in each package of the product manufactured.[74] The primary purpose of the leaflets was "to recall to the patient her discussion with the physician when she made her decision to begin taking oral contraceptives."[75] Although the original proposed text of these leaflets consisted of a detailed 600-word statement discussing the hazards related to oral contraceptive use in lay language,[76] when these leaflets reached the marketplace, they had been reduced to a 155-word warning that mentioned only an increased incidence of bloodclotting among pill users.[77] Even so, this leaflet did represent the FDA's initial response to the public's demand for more adequate direct information. In an effort to provide consumers with expanded labeling information about recent reports on the risk of blood clots, other problems of the circulatory system, cancer, and effects on the unborn child associated with the use of oral contraceptives, this original warning leaflet was replaced in 1978

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[69]*See Nelson Comm. Hearings*, *supra* note 54, at 6789.

[70]*Id.* Additional reports of deaths and injuries had been received, but the FDA could not clearly identify their epidemiological origin. *Id.*

[71]*See* Note, *Products Liability and the Pill*, 19 CLEV. ST. L. REV. 468 (1970). It should be noted that all 300 actions arose from injuries caused by adverse reactions from the pill. None of these suits had been brought on a theory of breach of warranty by plaintiffs who had conceived unexpectedly while on the pill. *Id.*

[72]*Nelson Comm. Hearings*, *supra* note 54, at 6628. The complete results of the poll were reported in *Poll on the Pill*, NEWSWEEK, Feb. 9, 1970, at 52.

[73]The complete text of Senator Nelson's hearings regarding oral contraceptives are documented as *Hearings on Present Status of Competition in the Pharmaceutical Industry Before the Subcomm. on Monopoly of the Senate Comm. on Small Business*, 91st Cong., 2d Sess., 5921-7324 (1970).

[74]*See Nelson Comm. Hearings*, *supra* note 54, at 6800.

[75]*Id.*

[76]For original proposed text of leaflets, see *Nelson Comm. Hearings*, *supra* note 54, at 6800-01.

[77]21 C.F.R. § 130.45(d)(1) (1971).

by the current patient package insert program.[78] Presently, the FDA requires oral contraceptive manufacturers to provide users of the pill with two types of informational materials: (1) a brief summary containing essential information to be included in each package as it is dispensed to each user,[79] and (2) a longer, more detailed labeling device to be included in or dispensed with each package as it is distributed.[80] In the preamble to the 1978 replacement, the FDA Commissioner, Charles Edwards, responded to manufacturers' concerns focusing on the immense difficulty of preparing *understandable* direct patient warnings that would be considered legally adequate, and the consequential potential for adverse jury determinations on the issue of adequacy.[81] Commissioner Edwards adamantly stated that the federal regulation of warning labels enacted in 1978 would have no adverse effect on the standard of civil tort liability imposed on the oral contraceptive industry.[82] Rather, Edwards stated that the liability of oral contraceptive manufacturers for their products' adverse effects would continue to be determined on a case-by-case basis, taking into consideration the applicable state negligence law, which could be altered to reflect state approval or disapproval of federally-implemented patient package insert programs.[83]

IV. The Judiciary's Answer to Plaintiffs Injured by the Ingestion of Oral Contraceptives

Amid court battles against the manufacturers of vaccines and conflicting signals by the FDA concerning a manufacturer's duty to warn oral contraceptive users of their products' associated risks, several oral contraceptive users filed suit for injuries sustained as a result of ingesting

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[78] *Id.* In 1974, the FDA withdrew 21 C.F.R. § 130.45 and replaced it in its renumbered version, 21 C.F.R. § 310.501. The text of the warning leaflet was unaltered. However, as previously noted, this leaflet warning was totally replaced by new text in 1978. Since its original passage in 1978, this text of the patient package insert has remained virtually unchanged.

[79] 21 C.F.R. § 310.501(a)(1). For specific requirements of information to be included within the brief summary, see 21 C.F.R. § 310.501(a)(2). Generally, brief summary must include information on the drug's effectiveness, contraindications for use, the serious side effects of contraceptive use, and the most common side effects of contraceptive use.

[80] 21 C.F.R. § 310.501(a)(1). For specific requirements of information to be included within the detailed patient labeling, see 21 C.F.R. § 310.501(a)(3). Generally, the detailed patient labeling must include the same types of information as the brief summary; however, the text of this information is to be more extensive and specific.

[81] 43 Fed. Reg. 4214 (1978).

[82] *Id.* Edwards believed that improved warning programs would bring reduced risk of liability "due to improved patient compliance with physician directions and self-monitoring of adverse effects, and a corresponding decrease in drug-induced injury." 43 Fed. Reg. 4214 (1978).

[83] *Id.*

the pill.[84] For the most part, manufacturers were relieved of any liability; the courts applied the learned intermediary doctrine and held that where the manufacturer had adequately warned the physician, either directly or indirectly, no common law duty to warn the consumer existed.[85] Thus, the primary issue rarely involved to whom a warning was owed, but whether the warning given the physician had been adequate.[86] Then in 1985, three surprising cases were decided that completely disregarded the doctrine of the learned intermediary in the area of oral contraceptives and imposed a duty on the manufacturer to warn the ultimate consumer, the patient, directly.[87]

A. MacDonald v. Ortho Pharmaceutical Corporation

In *MacDonald v. Ortho Pharmaceutical Corporation*,[88] the Massachusetts Supreme Court reviewed the propriety of an action brought by a plaintiff who suffered a stroke with resultant permanent disabilities after ingesting Ortho's product, Ortho-Novum, for a period spanning at least three years.[89] Unquestionably, the plaintiff had received both the brief summary and detailed warning pamphlet as dictated by FDA regulations.[90] Both materials referred to abnormal blood clotting as a potential side effect of Ortho-Novum, yet neither contained the specific word "stroke."[91] Accordingly, the plaintiff testified that she had never

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[84]Brochu v. Ortho Pharmaceutical Corp., 642 F.2d 652 (1st Cir. 1981); Lindsay v. Ortho Pharmaceutical Corp., 637 F.2d 87 (2d Cir. 1980); Skill v. Martinez, 91 F.R.D. 498 (D.N.J. 1981), *aff'd*, 677 F.2d 368 (3d Cir. 1982); Goodson v. Searle Laboratories, 471 F. Supp. 546 (D. Conn. 1978); Dunkin v. Syntex Laboratories, Inc., 443 F. Supp. 121 (W.D. Tenn. 1977); Chambers v. G.D. Searle & Company, 441 F. Supp. 377 (D. Md. 1975), *aff'd*, 567 F.2d 269 (4th Cir. 1977); Hamilton v. Hardy, 37 Colo. App. 375, 549 P.2d 1099 (1976); Mahr v. G.D. Searle & Company, 390 N.E.2d 1214 (Ill. 1979); Ortho Pharmaceutical Corp. v. Chapman, 388 N.E.2d 541 (Ind. Ct. App. 1979); Cobb v. Syntex Laboratories, 444 So. 2d 203 (La. Ct. App. 1983); Leibowitz v. Ortho Pharmaceutical Corp., 224 Pa. Super. 418, 307 A.2d 449 (1973).

[85]*See* cases cited at *supra* note 84. *But see* Lukaszewicz v. Ortho Pharmaceutical Corp., 510 F. Supp. 961 (E.D. Wis. 1981) (court held that manufacturer had a duty to warn patient directly but compliance with FDA regulations would satisfy such duty). *Id.* at 965.

[86]*But see* McEwen v. Ortho Pharmaceutical Corp., 270 Or. 375, 528 P.2d 522 (1974) in which the court recognized the learned intermediary doctrine but extended the duty to warn to encompass treating physicians as well as prescribing physicians.

[87]*See* Odgers v. Ortho Pharmaceutical Corp., 609 F. Supp. 867 (E.D. Mich. 1985); Stephens v. G.D. Searle & Company, 602 F. Supp. 379 (E.D. Mich. 1985); MacDonald v. Ortho Pharmaceutical Corp., 394 Mass. 131, 475 N.E.2d 65, *cert. denied*, 106 S. Ct. 250 (1985).

[88]394 Mass. at 132, 475 N.E.2d at 66, *cert. denied*, 106 S. Ct. 250 (1985).

[89]*Id.* The action in *MacDonald* was actually brought by two plaintiffs, the injured user and her husband. *Id.* at 131, 475 N.E.2d at 65.

[90]*Id.* at 132-33, 475 N.E.2d at 66-67.

[91]*Id.* at 133, 475 N.E.2d at 67. Ortho's detailed warning pamphlet did contain the following passage:

realized that abnormal blood clotting included the possibility of stroke.[92]

In reversing the lower court's final disposition of the case,[93] the Massachusetts Supreme Court openly abandoned the learned intermediary rule in cases involving injuries caused by oral contraceptives and imposed on the defendant-manufacturer a duty to warn the consumer directly.[94] Explaining the reasoning underlying its decision, the *MacDonald* court stated that oral contraceptives and the circumstances under which they are frequently prescribed necessitate the revitalization of the common law duty of a manufacturer of a dangerous product to warn the user directly of potential adverse effects.[95] Specifically, the court noted that oral contraceptives are drugs not taken out of medical necessity; rather, oral contraceptives are drugs personally selected by the patient amid a myriad of other available birth control plans.[96] Because the consumer plays a significantly more active role in deciding to use the pill, the physician's role as a learned intermediary between manufacturer and consumer becomes nearly non-existent. A prescription for oral contraceptives is not the result of a physician's skilled balancing of individual benefits and risks, but rather originates as a product of patient demand.[97]

In addition, the *MacDonald* court emphasized that oral contraceptives are frequently prescribed for protracted periods of eleven or twelve months in which the patient may ingest numerous doses without re-examination or direct supervision by the prescribing physician.[98] Such a setting is unlikely to favor the formation of a strong patient-physician relationship. Therefore, the consumer may develop multiple concerns and questions relating to her oral contraceptive regimen without ever having the opportunity to present these to the prescribing physician.[99]

Finally, the *MacDonald* court referred to federal regulations imposed on the manufacturers of oral contraceptives to support implicitly the

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About blood clots:

> Blood clots occasionally form in the blood vessels of the legs and the pelvis of apparently healthy people and may threaten life if the clots break loose and then lodge in the lung or if they form in other vital organs, such as the brain.

Id. at 133 n.4, 475 N.E.2d at 67 n.4.

[92] *Id.* at 134, 475 N.E.2d at 67.

[93] *Id.* at 135, 475 N.E.2d at 68. At the trial court level, the jury found that Ortho had adequately warned the plaintiff's physician of risks inherent in the use of Ortho-Novum, but had failed to provide the plaintiff with sufficient information. The jury reasoned that this insufficiency had proximately caused the plaintiff's injury and that the defendant-manufacturer was liable for the resultant damages. However, the trial court judge granted Ortho's motion for judgment notwithstanding the verdict, basing his decision on the applicability of the learned intermediary doctrine. *Id.* at 135, 475 N.E.2d at 68.

[94] *Id.* at 135, 138-39, 475 N.E.2d at 68, 70.

[95] *Id.* at 137, 475 N.E.2d at 69.

[96] *Id.*

[97] *Id.*

[98] *Id.*

[99] *Id.*

imposition of a common law duty to warn.[100] Inferrable from the court's reiteration of factors leading to the FDA's implementation of a direct patient warning program,[101] the court reasoned that these same factors readily justified a judicial abandonment of the learned intermediary doctrine in civil cases dealing with oral contraceptives.[102] In addition, oral contraceptive manufacturers' nationwide compliance wth FDA regulations proved that direct information provided to the patient-user was a feasible, economical means of disseminating warnings of potential adverse effects.[103] Given all these considerations, the *MacDonald* court had little or no difficulty in holding that the defendant-manufacturer bore a duty to warn the patient-consumer directly.[104]

Having made this decision as to the scope of Ortho's duty to warn, the *MacDonald* court next examined the adequacy of the warning Ortho had supplied directly to the plaintiff in an attempt to comply with FDA requirements.[105] The text of the warning received by the plaintiff in both the brief summary and more detailed warning pamphlet had been explicitly approved by the FDA.[106] However, the *MacDonald* court initially cited Commissioner Edwards' statement in the preamble to the FDA's 1978 replacement of section 310.501 of Title 21 of the Code of Federal Regulations for the proposition that "the boundaries of civil tort liability for failure to warn are controlled by applicable State law," rather than by FDA labeling requirements.[107] The *MacDonald* court joined with the majority of jurisdictions to hold that federally-based requirements have

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[100] *Id.* at 137-38, 475 N.E.2d at 69-70.

[101] *Id.* In particular, the *MacDonald* court cited 43 Fed. Reg. 4215 (1978), at which the FDA stated the primary reasons for implementation of 21 C.F.R. § 310.501 as follows:

> Because oral contraceptives are ordinarily taken electively by healthy women who have available to them alternative methods of treatment, and because of the relatively high incidence of serious illnesses associated with their use, . . . users of these drugs should, without exception, be furnished with written information telling them of the drug's benefits and risks.

43 Fed. Reg. 4215 (1978). In addition, the *MacDonald* court cited 35 Fed. Reg. 9002 (1970), for the FDA's reasoning supporting its earlier regulations codified at 21 C.F.R. § 130.45. The FDA considered direct patient warnings necessary because the use of oral contraceptives is "too complex to expect the patient to remember everything told her by the physician," and, as a result, patient users need information "in an organized, comprehensive, understandable, and handy-for-future-reference form." 35 Fed. Reg. 9002 (1970).

[102] 394 Mass. at 137-38, 475 N.E.2d at 70.

[103] The impracticability of a manufacturer's providing warnings directly to the consumer concerning adverse effects had frequently been given as an argument in favor of the learned intermediary doctrine. *See, e.g.*, sources cited at *supra* note 34.

[104] 394 Mass. at 137-38, 475 N.E.2d at 68, 70.

[105] *Id.* at 139, 475 N.E.2d at 70.

[106] *Id.*

[107] *Id.* (citing 43 Fed. Reg. 4214 (1978)).

no preemptive effect on state tort law.[108] Although compliance with FDA standards could be offered as evidence of due care, the *MacDonald* court distinctly noted that, in the absence of the learned intermediary doctrine's applicability, the common law required that warnings of a product's adverse effects be provided in a manner "comprehensible to the average user and . . . convey[ing] a fair indication of the nature and extent of the danger to the mind of a reasonably prudent person."[109] In the opinion of the *MacDonald* court, the jury could reasonably have found that the omission of the specific word "stroke" from FDA-approved warning materials minimized the warning's impact to render the warning inadequate for the average consumer.[110]

In summary, Ortho's liability for failing to warn the consumer-patient directly resulted from the combined effect of two factors. First, the *MacDonald* court decided to void the applicability of the learned intermediary doctrine in cases dealing with injuries induced by oral contraceptives. Second, the jury determined as lay persons that the FDA-approved warning given directly to the plaintiff by Ortho was inadequate under the rigors of state negligence doctrine.

B. Odgers v. Ortho Pharmaceutical Corporation

While the *MacDonald* action was progressing through the Massachusetts state court system, two similar actions were just beginning in the federal district court of Michigan.[111] In *Odgers v. Ortho Pharmaceutical Corporation*,[112] the plaintiff allegedly suffered partial paralysis as a result of a blood clot induced by her ingestion of Ortho-Novum, a product of the defendant-manufacturer.[113] The oral contraceptive man-

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[108]*See, e.g.*, Brochu v. Ortho Pharmaceutical Corp., 642 F.2d 652, 658 (1st Cir. 1981); Hubbard-Hall Chem. Co. v. Silverman, 340 F.2d 402, 405 (1st Cir. 1965); Ferebee v. Chevron Chem. Co., 552 F. Supp. 1293, 1304 (D.D.C. 1982), *aff'd*, 736 F.2d 1529 (D.C. Cir. 1984), *cert. denied*, 105 S. Ct. 545 (1984); Skill v. Martinez, 91 F.R.D. 498, 508 (D.N.J. 1981), *aff'd*, 677 F.2d 368 (3d Cir. 1982); Wooderson v. Ortho Pharmaceutical Corp., 235 Kan. 387, 409, 681 P.2d 1038, 1055, *cert. denied*, 105 S. Ct. 365 (1984); McEwen v. Ortho Pharmaceutical Corp., 270 Or. 375, 386, 528 P.2d 522, 534 (1974); Stevens v. Parke, Davis & Co., 9 Cal. 3d 51, 64, 507 P.2d 653, 661, 107 Cal. Rptr. 45, 53 (1973).

[109]394 Mass. at 140, 475 N.E.2d at 71 (quoting Ortho Pharmaceutical Corp. v. Chapman, 180 Ind. App. 33, 49, 388 N.E.2d 541, 552 (1979)). In addition, the *MacDonald* court felt very strongly that the sufficiency of any given warning is always a question for the jury. 394 Mass. at 140, 475 N.E.2d at 71. As a result, the liability of an oral contraceptive manufacturer based on failure to warn the consumer adequately remains unknown until the final poll of the jury.

[110]394 Mass. at 141, 475 N.E.2d at 71-72.

[111]*See* Odgers v. Ortho Pharmaceutical Corp., 609 F. Supp. 867, Stephens v. G.D. Searle & Company, 602 F. Supp. 379.

[112]609 F. Supp. 867 (E.D. Mich. 1985).

[113]*Id.* at 868.

ufacturer had provided the plaintiff's physician with package inserts.[114] The plaintiff had received her prescription only after careful examination by her physician[115] and receipt of a brief summary of adverse effects and a warning pamphlet, both prepared by Ortho in accordance with the applicable FDA regulations.[116] Despite these measures, the plaintiff maintained that Ortho had failed to warn her adequately of its product's potential side effects.[117] In opposition, the drug manufacturer contended that it had more than fulfilled its duty of due care, relying on its compliance with FDA regulations and the learned intermediary doctrine for support.[118]

Following a verdict for the plaintiff, the trial court granted Ortho's motion for a new trial on the ground that the jury had been improperly instructed on the scope of Ortho's duty to warn[119] and certified a question concerning Ortho's duty to the Michigan Supreme Court in *In re Certified Questions*.[120] However, the majority of the Michigan Supreme Court refused to decide whether Ortho had a duty to warn the consumer directly of the dangers associated with the use of of oral contraceptives.[121]

The majority in *In re Certified Questions* maintained that to render any decision on the issue of Ortho's duty would require

> a choice between different systems for allocating between manufacturers, physicians, and pharmacists the duty to warn patients of the risks and potential side effects associated with the use of prescription drugs. . . . [A]ny decision of this Court implicates the obligations of members of professions who are involved in

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[114]*See* In re Certified Questions, 419 Mich. 686, 694, 358 N.W.2d 873, 875, *reh'g denied*, 421 Mich. 1201 (1984). *In re Certified Questions* is cited here to provide facts not discussed in *Odgers*, 609 F. Supp. 867.

[115]419 Mich. at 694, 358 N.W.2d at 876.

[116]21 C.F.R. § 310.501. It should be noted that not only were the brief summary and warning pamphlet FDA approved, but the text of the brief summary had been drafted by the FDA. *In re* Certified Questions, 419 Mich. at 694, 358 N.W.2d at 875.

[117]*Odgers*, 609 F. Supp. at 868.

[118]*Id.* at 869, 877.

[119]Specifically, the trial judge had instructed the *Odgers* jury that "Ortho owed her [the plaintiff] the duty of reasonable care in the preparation of the booklet [warning pamphlet] accompanying the drug that, under federal regulations, Ortho was required to distribute." *In re* Certified Questions, 419 Mich. at 694, 358 N.W.2d at 876. Because the trial judge cited to Smith v. E.R. Squibb & Sons, Inc., 405 Mich. 79, 90, 273 N.W.2d 476, 484, in determining that the above instruction was improper, it appears that a correct jury instruction in *Odgers* would have called upon the jury to determine whether the warnings actually given were reasonably adequate, not whether the manufacturer acted reasonably. *See generally* Smith v. E.R. Squibb & Sons, Inc., 405 Mich. 79, 90, 273 N.W.2d 476, 483-84 (Mich. 1979) (discussion of proper jury instruction in products liability action based on breach of duty to warn).

[120]419 Mich. 686, 358 N.W.2d 873.

[121]*Id.* at 692, 698, 358 N.W.2d at 874, 877-78.

> the distribution of prescription drugs but not represented in these proceedings.[122]

In fact, the majority in *In re Certified Questions* stated that to determine judicially the scope of Ortho's duty to warn would be to assume a function best left to state legislative bodies.[123]

On the other hand, three dissenting justices in *In re Certified Questions* had no difficulty in imposing a duty on Ortho to warn the users of oral contraceptives directly.[124] The dissent's reasoning focused on the absence of any of those arguments commonly used to validate the learned intermediary exception to the common law duty to warn in oral contraceptive cases[125] because the drugs were used solely for nontherapeutic purposes. The dissent initially noted that, unlike other prescription drug users, oral contraceptive users generally do not rely on their physician's skill, but demand to have the pill.[126] Direct-to-the-consumer warnings, therefore, are less likely to damper patient use of the contraceptive because it is the patient who choses the medication.

In addition, the *In re Certified Questions* dissent noted, like the *McDonald* court, that oral contraceptives are frequently prescribed on a long-term basis without intermittent examination and evaluation by the physician.[127] Thus, the original goal of the learned intermediary doctrine, the reduction of patient injuries via physician monitoring,[128] is most likely unachievable in the oral contraceptive industry.[129] Finally, the dissent noted that the FDA regulations requiring direct warnings undercut the argument that it is impossible for drug manufacturers to give these warnings to consumers.[130] Thus, in the absence of any reason previously used to validate the application of the learned intermediary doctrine, the dissent would not have hesitated to impose a duty on pill producers to warn consumers directly.[131]

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[122]*Id.* at 697-98, 358 N.W.2d at 877.

[123]Specifically, the *In re Certified Questions* majority stated:

> The allocation of the duty to warn patients is a public policy question involving the marketing system and economics of a major industry and the everyday practice of an essential profession. We believe that the Legislature is in a better position to allocate those duties.

419 Mich. at 691-92, 358 N.W.2d at 874.

[124]*Id.* at 716, 358 N.W.2d at 886 (Boyle, J., dissenting).

[125]*Id.* at 711, 358 N.W.2d at 884-85.

[126]*Id.* at 711, 358 N.W.2d at 884. Succinctly, the dissent stated that "patient choice plays a much more prominent role [in oral contraceptive use] than in the case of drugs prescribed for the treatment of illness or injury. The role of patient choice in this process supports the need for a direct patient warning. *Id.* at 712, 358 N.W.2d at 884.

[127]*Id.* at 714, 358 N.W.2d at 885.

[128]Sterling Drug, Inc. v. Cornish, 370 F.2d at 82, 85 (8th Cir. 1966).

[129]*In re* Certified Questions, 419 Mich. at 714, 358 N.W.2d at 885.

[130]*Id.* at 714, 358 N.W.2d 885-86.

[131]*Id.* at 716, 358 N.W.2d 886.

The certification's result still left the federal judge in *Odgers v. Ortho Pharmaceutical Corporation* without any concrete statement of an oral contraceptive manufacturer's duty to warn under Michigan law. However, after fully justifying the ability of a federal judge to elucidate unsettled matters of state substantive law,[132] the *Odgers* court inferred from the Michigan Supreme Court's reluctance to apply the learned intermediary doctrine to oral contraceptives that Ortho had a duty to warn the consumer directly in the case of oral contraceptives used for nontherapeutic purposes.[133] In support of its decision, the trial court drew from the rationale of the dissent in *In re Certified Questions*.[134] The *Odgers* court reasoned that none of the customary arguments invoking the learned intermediary exception applied when the prescription drug in question was an oral contraceptive used for contraceptive purposes.[135]

C. Stephens v. G.D. Searle & Company

In the second Michigan federal case, *Stephens v. G.D. Searle & Company*,[136] which was decided after the ruling in *In re Certified Questions* but before *Odgers*, a similar duty was imposed.[137] The *Stephens* court was asked to rule on the oral contraceptive manufacturer's motion for summary judgment in an action brought by a plaintiff alleged to have suffered a stroke as a result of her ingestion of the defendant's product.[138] In denying Searle's motion for summary judgment, which had been based both on a predicted application of the learned intermediary doctrine[139] and Searle's compliance with FDA regulations concerning

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[132]The ability of a federal judge to decide matters of state substantive law are beyond the scope of this Note. *See* Odgers v. Ortho Pharmaceutical Corp., 609 F. Supp. at 869-70.

[133]*Odgers*, 609 F. Supp. at 878.

[134]*Id.* at 870-78. Specifically, the *Odgers* court relied heavily upon the language of *MacDonald*, citing at length from its text. *Id.* at 874-75. The *Odgers* court then noted that the rationale of the dissent in *In re Certified Questions* closely paralleled that of *MacDonald* in the reasons that were espoused for imposing a duty to warn the consumer directly:

> use attributed to consumer demand rather than physician's advice, use for extended periods without medical assessment, and FDA regulations requiring direct warnings to patients.

609 F. Supp. at 875. In addition, the *Odgers* court noted the *In re Certified Questions* dissent's emphasis on the fact that "consumers of oral contraceptives are subjected to much laudatory publicity attributable to the manufacturers and aimed directly at consumers." *Id.*

[135]*Id.* at 875.

[136]602 F. Supp. 379 (E.D. Mich. 1985).

[137]*Id.* at 381.

[138]*Id.* at 380.

[139]*Id.*

patient warnings,[140] the *Stephens* court relied heavily on the dissenting opinion of *In re Certified Questions* to impose a duty to warn the consumer directly on the manufacturer when its product had been used solely for contraceptive purposes.[141] In addition, the *Stephens* court, like the *MacDonald* court, held that compliance with FDA standards did not conclusively determine the issue of warning adequacy, a question which is exclusively a matter of state negligence law.[142]

In summary, all three cases — *MacDonald, Ogders,* and *Stephens* — held that the doctrine of the learned intermediary simply is not applicable to the distribution of the pill, at least in cases in which oral contraceptives are used solely for contraceptive purposes. The basis of these decisions rests primarily on the particular characteristics attendant to the distribution and ingestion of the pill. Oral contraceptives are readily chosen by healthy normal women, frequently as a result of product advertising rather than reliance on the advice of their personal physician. In addition, oral contraceptives are most often prescribed for significant portions of a woman's childbearing years and ingested daily with only intermittent, if any, medical supervision and assessment of the user's condition. These two factors, combined with the apparent feasibility of direct warnings as evidenced by the manufacturers' compliance with FDA regulations, induced the courts to impose on the oral contraceptive manufacturer a duty to warn the patient-consumer directly. Once such a duty was found, the courts then applied the negligence law of their particular jurisdiction and allowed the jury to determine whether the manufacturer in question had met its duty. Thus, *McDonald* and its progeny unquestionably unleashed a theory of liability to be used against the prescription drug industry: a new duty to warn, the adequacy of which can never be predicted until after the damage is done.

V. The Ramifications of *MacDonald* and Its Progeny: An Era of Unpredictability, Unlimited Liability, and Unavailability?

For a short period in the development of products liability law, the learned intermediary doctrine stood unquestioned as an exception to the common law duty of every manufacturer to warn a product's user of dangers inherent to its use.[143] Shortly thereafter, *Davis*[144] and *Reyes*[145] created limitations on this doctrine that somewhat undermined its vitality. Today *MacDonald*, *Stephens*, and *Odgers* appear to reject completely

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[140] *Id.* at 382.
[141] *Id.* at 381.
[142] *Id.* at 382.
[143] *See supra* note 20.
[144] *Davis*, 399 F.2d at 131.
[145] 498 F.2d at 1277.

the application of the learned intermediary doctrine in oral contraceptive cases by imposing a common law duty to warn the consumer directly. This revitalization of a common law duty to warn the consumer and the policies behind it bear serious ramifications for both society and the pharmaceutical industry in terms of unpredictability, unlimited liability, unavailability. The logical existence of these unpleasant ramifications is readily supported by analogy to the initial limitation of the learned intermediary doctrine in mass immunization cases and its resultant effect on the vaccine sector of the drug industry. As originally espoused by *Davis* and *Reyes*, the court-created limitations on the learned intermediary doctrine applied only where vaccines, which are prescription drugs, were "not dispensed as such,"[146] that is, where vaccines were administered in mass immunization settings. Subsequently, the vaccine manufacturer's duty to warn the consumer directly was extended to encompass virtually all immunization situations including those in which the manufacturer's product was administered in a private physician's office.[147]

Once the duty to provide direct warnings to consumers became firmly entrenched as the rule in vaccine-related litigation, judicial focus then turned to the adequacy of the manufacturer's warning. In almost every case, the warning given the patient-consumer was determined to be inadequate because the fact situation of the case allowed a jury to "reasonably" find, under applicable state negligence law, that the manufacturer's warning had not sufficiently alerted vaccinees of potential risks.[148] In the face of mounting liability based on inadequacy of warning and other theories of liability,[149] manufacturers producing diphtheria-pertussis-tetanus (DPT) vaccines which bear inherent, but rare, serious side effects are opting out of the marketplace or threatening to do so, absent government intervention.[150]

DPT is a vaccine which is given to nearly every American child[151] to combat three serious childhood diseases,[152] yet it is estimated that

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[146]*Davis*, 399 F.2d at 131.

[147]*See* Givens v. Lederle, 556 F.2d 1341 (5th Cir. 1979); Williams v. Lederle Laboratories, 591 F. Supp. 381 (S.D. Ohio 1984).

[148]*See* Ezagui v. Dow Chemical Corp., 598 F.2d 727, 736 (2d Cir. 1979); Givens v. Lederle, 556 F.2d at 1345.

[149]Prevalent theories of liability in immunization cases frequently involve allegations of failure to manufacture an optimum vaccine or failure to manufacture a vaccine which is as safe as a competitor's product. *See, e.g.*, Tomer v. Lederle Laboratories (No. 84-3906, S.D. Idaho 1984), *discussed in* Nat'l L.J., Apr. 1, 1985, at 26, col. 2; Tom v. Wyeth Laboratories (No. 82 L 17548, N.D. Illinois 1983), *discussed in* Nat'l L.J., Apr. 1, 1985, at 27, col. 1.

[150]Nat'l L.J., Apr. 1, 1985, at 27, col. 2.

[151]Currently, 41 states require that every child be immunized with DPT vaccines prior to entering school. Nat'l L.J., Apr. 1, 1985, at 1, col. 3.

[152]DPT vaccines protect against diphtheria, pertussis ("whooping cough") and tetanus ("lock jaw").

one child out of every 310,000 vaccinees will suffer serious injury, such as brain damage.[153] As a result of these injuries, nearly 150 lawsuits are already on file against DPT producers, although defendant-manufacturers claim that the vaccine is "as safe as medical science can make it."[154]

Following the vaccine's introduction into the marketplace, nearly a dozen companies produced the vaccine, yet this number dwindled to three in 1984 and one in 1985.[155] The factor cited most often for production withdrawal was the cost of defending DPT litigation.[156] Today, Lederle Laboratories remains as the sole producer of DPT vaccines.[157] However, even its days of production may be numbered. DPT-related lawsuits currently pending against Lederle bear dollar demands amounting to a sum two hundred times greater than Lederle's gross sales of the product in 1983.[158] In an effort to continue supplying DPT, Lederle urged Congress to pass legislation that would insulate it from the harsh liability demands of plaintiffs injured by a vaccine, allegedly incapable of safer production.[159] Such legislation, however, has been slow to develop. Time alone will determine whether an immunity program is passed prior to Lederle's withdrawal from the marketplace. Although it may be difficult to summon much sympathy for the liability woes of a multi-million dollar pharmaceutical company whose product undeniably causes injury, problems of the producer ultimately translate into problems for the consumer. The increasing liability of DPT manufacturers and their resultant withdrawal from production has led to an obvious decrease in the availability of DPT vaccine materials.[160] In fact, the shortage of these products resulted in an unprecedented request from the Centers for Disease Control in Atlanta: "a request for physicians and other health care providers to delay giving DPT booster shots in order to insure a sufficient supply of the vaccine to immunize infants from these highly contagious diseases."[161] In economic response to decreased supply, the cost of DPT vaccines skyrocketed. In 1983, the average cost of a single

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[153]Nat'l L.J., Apr. 1, 1985, at 1, col. 3.

[154]*Id.*

[155]*Id.* at 27, col. 2.

[156]*Id.*

[157]*Id.*

[158]*Id.*

[159]The National Childhood Vaccine-Injury Compensation Act was introduced in the Senate, but it never progressed beyond the hearing stage. Such legislation would establish a "no-fault, national program to compensate children who are injured by a childhood vaccine. S. 827, 99th Cong., 1st Sess., 131 CONG. REC. S3844. Lederle is also in the process of drafting a compensation program, but Lederle's proposed program would be privately funded. Nat'l L.J., Apr. 1, 1985, at 27, col. 3.

[160]*See* Notice, *Diphtheria-Tetanus-Pertussis Vaccine Shortage*, 34 MORBIDITY AND MORTALITY WEEKLY REPORT 103 (1985). *See also* 131 CONG. REC. S3844 (daily ed. Apr. 2, 1985).

[161]S. 827, 99th Cong., 1st Sess., 131 CONG. REC. S3844.

dose was eleven cents; in April, 1985, the same dose cost $2.80.[162] Decreased supply plus increased cost equals an increased incidence of pertussis for the public in general. The number of reported cases of pertussis, more commonly known as "whooping cough," increased by nearly thirty-three percent between 1982 and 1983.[163] Of these documented cases, sixty-six percent of the children under six years old affected had not received the full complement of three doses required to immunize completely against the disease.[164] Given the current state of DPT vaccine production, these numbers are likely to rise in the future. Thus, what started as a judicial attempt to provide compensation for injury sustained by a limited group of plaintiffs has actually acted to the detriment of society as a whole, a detriment resulting from unavailability, increased cost, and increased disease.

A similar result in the area of oral contraception is not beyond imagination or logic. Just as *Davis* and *Reyes* opened a whole new avenue of liability for the manufacturers of vaccines, *MacDonald* and its progeny created a new theory of liability to be wielded against the producers of the pill: the failure to warn the patient-consumer directly and adequately. Given the ability of oral contraceptive manufacturers to comply with FDA warning regulations and given the fact that direct patient warnings do enhance patient compliance,[165] the imposition of a duty to warn the patient-consumer is neither impractical nor unbeneficial from the standpoint of both manufacturer and consumer. However, the resolution of the adequacy issue on a case-by-case basis must seriously be questioned, for it will inevitably lead the producers of the pill down the well-trodden path once traveled by the manufacturers of DPT vaccines. The courts' general denial of the determinative effect of compliance with FDA patient package insert regulations may well coincide with similar rulings in other areas of products liability law,[166] yet it leaves the oral contraceptive manufacturer with no predictable basis of liability. The adequacy of any given warning, even those approved

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[162]*Id.*

[163]The total number of pertussis cases reported in 1982 was 1,895, while 2,463 cases were reported in 1983. *Current Trends, Pertussis-United States, 1982 and 1983*, 33 MORBIDITY AND MORTALITY WEEKLY REPORT 573 (1984).

[164]*Id.* Those cases reported for the age group of six years and under comprised approximately 82% of all reported cases. *Id.* at 573-74.

[165]*See generally The Meaning of Medications: Another Look at Compliance*, 20 SOC. SCI. MED. 29 (1985).

[166]*See, e.g.*, Howard v. McCrory Corp., 601 F.2d 133 (4th Cir. 1979) (flammability of children's attire); LaGorga v. Kroger Co., 275 F. Supp. 373 (W.D. Pa. 1967), *aff'd*, 407 F.2d 671 (3d Cir. 1969) (flammability of children's attire); Buccery v. General Motors Corp., 60 Cal. App. 3d 676, 132 Cal. Rptr. 605 (1976) (lack of headrest on vehicle); Rumsey v. Freeway Manor Minimax, 423 S.W.2d 387 (Tex. Civ. App. 1968) (failure to warn of absence of antidote to pesticides).

by the FDA, will never be settled until after a user is injured and a jury returns a verdict. The thought that a manufacturer will "know better the next time" can hardly be considered solace to either plaintiff or defendant. Perhaps if one uniform, adequate set of warnings had been available and complied with, both injury and liability could have been avoided. The marketplace effect of this expanded manufacturer liability on the oral contraceptive consumer is uncertain. Given both the pill's widespread use[167] and its presumably wide profit margin, oral contraceptive manufacturers may well be able to weather the threatening storm of increased liability. However, it is equally plausible that smaller oral contraceptive manufacturers or the manufacturers of contraceptives holding only a small percentage of the marketshare will simply close shop rather than bear the risk of making large capital investments to meet enhanced warning requirements, only to find out later that such attempts were in vain within a particular jurisdiction. At the very least, it is likely that oral contraceptive manufacturers may distribute their products selectively rather than nationally in the future. Pill producers may readily distribute their product in areas of previously "jury-established" law or in jurisdictions that recognize the exculpatory effect of compliance with FDA patient package insert regulations.[168] Yet those same producers may simply refuse to distribute the pill in areas where the law is "in flux" or consistently "anti-manufacturer." Thus, tomorrow's population of American women may well face a scarcity of oral contraceptives of the proportion currently being realized among potential DPT vaccinees. Increased costs predictably accompany decreased supply. Increased costs, in turn, may place oral contraceptives, once heralded as the future of birth control,[169] beyond the reach of poorer segments of the American population and off the shelves of free university facilities and federally-funded public clinics. Unavailability inevitably leads to rising birth rates. In the litigation arena, the holdings of *MacDonald* and its progeny bear a perversion for potential plaintiffs. Jurisdiction-by-jurisdiction, jury determination of direct warning adequacy will invariably lead to forum shopping on the part of injured pill users. Current nationwide distribution of oral contraceptives by major manufacturers subjects such producers to *in personam* jurisdiction na-

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[167]It is currently estimated that 10 million-plus women currently choose oral contraceptives as their means of birth control. Lia, *Clinical Pharmacology of Common Minor Side Effects of Oral Contraceptives*, 24 CLINICAL OBSTETRICS AND GYNECOLOGY 879 (1981).

[168]*See* 21 C.F.R. § 310.501 (1985). For a court's recognition of the general exculpatory effect of FDA compliance, see Lukaszewicz v. Ortho Pharmaceutical Corp., 510 F. Supp. 961 (E.D. Wis. 1981).

[169]*See generally* Brown, *Nothing Will Affect Our Lives More*, The Evening Bulletin, Dec. 28, 1971, at 41, col. 7.

tionwide.[170] Thus, potential diversity plaintiffs could pick and chose between federal jurisdictions to select one where relevant choice of law leads to precedential jury-determinations most favorable to the circumstances surrounding their injury.

Having reflected upon the pitfalls resulting from the determination of a given warning's adequacy by a jury, the issue becomes whether the adequacy of a manufacturer's direct patient warning can ever be effectively dictated by state negligence law as espoused by all three recent oral contraceptive decisions. The question is likely to be answered in the negative. The urgent need for uniform standards determining the adequacy of oral contraceptive warnings transcends current state capabilities. Possible state-based solutions to this need could focus on the passage of legislation or codes by standing state legislatures or specially-created commissions. However, three problems with such plans come immediately to mind. The first of these drawbacks, cost, might appear trivial, but the added cost of creating such standards is a burden which must be borne by someone, most likely every taxpayer of a jurisdiction. Second, one must question the wisdom of placing the delicate task of determining the adequacy of a warning describing the use and potential side effects of oral contraceptives in the hands of a state political machine, most members of which probably having little medical training and/or exposure to the pill. Last, and most importantly, the determination of patient-direct warning standards by state legislative or administrative bodies may lend predictability to oral contraceptive manufacturers' liability but would still result in a varying set of standards[171] which may ultimately prove uneconomical and unpalatable to oral contraceptive manufacturers. Assuming that every state jurisdiction immediately enacted oral contraceptive patient warning standards, such a system could conceivably leave pill producers facing compliance with fifty similar, but distinguishable, standards. Compliance would entail the printing and stocking of fifty state-dictated warning devices in addition to the brief summaries and warning pamphlets currently mandated by FDA regulations.[172] Also, manufacturers would be confronted with increased prob-

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[170]*See* Keeton v. Hustler Magazine, Inc., 465 U.S. 770 (1984), where the United States Supreme Court stated:

> [T]he victim . . . may choose to bring suit in any forum with which the defendant has "certain minimum contacts . . . such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.' "

Id. at 780-81 (quoting International Shoe Co. v. Washington, 326 U.S. 310, 316 (1945)).

[171]In the area of product safety, laws promulgated at the state and local level have been described as a "hodge-podge of tragedy-inspired responses" and all generally characterized by "narrow scope, diffuse jurisdiction, miniscule budgets, absence of enforcement, mild sanctions, and casual administration." *See* FINAL REPORT, NATIONAL COMMISSION ON PRODUCT SAFETY 2, 81-88 (1970).

[172]21 C.F.R. § 310.501 (1985).

lems in product packaging and inventory control; a state-varied warning system would demand considerable effort to make certain "the right lots with the right warnings got to the right state." Finally, as actions premised on failure to warn adequately arose, as they inevitably would, nationwide distributors would be faced with the costly task of tailoring a defense viable within a given jurisdiction. Such complexity might lead to the selective distribution of oral contraceptives or withdrawal from the marketplace by pill producers. Practical, predictable state-based resolutions to the adequacy issue are non-existent. Consequently, renewed reliance on uniform FDA regulations detailing the scope and extent of direct patient warnings required of oral contraceptive manufacturers surfaces as the best, though judicially-refused solution. It may well be that current FDA mandates[173] do not result in warnings which "make the nature of the risk reasonably comprehensible to the average consumer."[174] Yet such a failing warrants a revamping of the standards, not a total disregard of their existence. The solution to the inadequacy problem lies in the careful, thorough revision of section 310.501 of Title 21 of the Code of Federal Regulations based on the input of consumers, health care providers, and manufacturers alike, not its juxtaposition by unpredictable state determinations. This realization, however, places an ethical burden on all parties involved. For the FDA, necessary revision of current regulations requires the agency to remain open and responsive to the demands and comprehension of the public at large rather than the purse strings of expansive pharmaceutical conglomerates. Likewise, for oral contraceptive manufacturers, a call for federal revamping of warning regulations necessitates a more brass-tacks approach to the adequacy problem. In the future, manufacturers must make a concerted effort to review the nature and extent of danger conveyed by a brief summary or a warning pamphlet from the eyes of a typical consumer. A stroke must be called a stroke, rather than "abnormal blood clotting which can be fatal."[175] However, the greatest burden will be borne by patient-consumers and health care providers. This burden requires an awareness of current oral contraceptive warning regulations, an assessment of the meaning and adequacy of them, and the revelation of needed revisions to those who can effect changes: manufacturers, consumer lobbyists, and the FDA itself. Finally, the determination of inadequate warning cases based on revamped federal

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[173] *Id.*

[174] *MacDonald,* 394 Mass. at 140, 475 N.E.2d at 71-72.

[175] *Id.* at 141, 475 N.E.2d at 71. It should be noted that subsequent to the events surrounding the *MacDonald* case, the FDA did amend its warning requirements to include specific reference to the word stroke. 394 Mass. at 134 n.6, 475 N.E.2d at 67 n.6 (citing 43 Fed. Reg. 4221 (1978)).

regulations will impose a burden on the judiciary. Barring a clear Congressional intent to preempt in the area of direct patient warnings federally, federal and state judges must recognize that revised FDA standards represent the ultimate product of consumer demands and medical/manufacturing expertise and, as such, must be considered determinative of the adequacy issue. Even the most comprehensive attempt to revamp FDA warning standards based on consumer demand and understanding will be thwarted unless judges accept compliance with such standards as conclusive on the adequacy issue.

Undoubtedly changes in oral contraceptive warning regulations at the federal level will be costly in terms of time, effort, and monetary expenditures. In addition, some injured patient-users may be left without compensation if the adequacy of a given patient warning is determined against an evolving federal standard. Yet, when these costs are evaluated against those potentially resulting from the courts' resolution of the adequacy issue on a jurisdiction-by-jurisdiction poll of the jury basis, risks of unpredictability, unlimited liability, and unavailability make a federal regulation system the most economical and practical solution to the warning problem.

VI. A Brief Look to the Future

The potential effect of *MacDonald* and its progeny on the prescription drug industry in general is uncertain in light of the limited precedential sphere of the courts in which those decisions were rendered. *MacDonald* is the product of the supreme court of a single state, Massachusetts, while *Odgers* and *Stephens* were both decided by a federal district court interpreting the negligence law of Michigan alone. In addition, both *Odgers* and *Stephens* appear to be self-limiting, imposing a duty to warn the oral contraceptive user directly only where the pill is used for non-therapeutic purposes.

MacDonald, Stephens, and *Odgers* do, however, represent a judicial reaffirmation of the common law duty to warn a product's user directly. Refusing to apply the learned intermediary doctrine, all three courts emphasized the lack of individualized medical assessment of a prescription drug's risks/benefits in reaching their ultimate decisions to impose a duty to warn the oral contraceptive user directly. This same reasoning was previously applied in the mass immunization cases, which emphasized the increasing role of the patient in the drug choice. Certain societal factors in America today forewarn that future courts may determine that other prescription drugs warrant the imposition of a similar duty on manufacturers of additional drug classes. Initially, it should be noted that the American public is "trending-away" from the type of one-on-one patient-physician relationship that was prevalent at the inception of

the learned intermediary doctrine.[176] Induced by life's fast pace and mobility, the modern patient no longer places his complete reliance and medical fate in the hands of one multi-talented, fatherly, family physician. Instead, America appears to be buying its health care from a stock selection of "fast-food" medicine served up at walk-in medical facilities.[177] A growing number of the population are procuring their prescriptions from medical personnel manning locally-based emergency clinics, health maintenance organizations, and university and employment health facilities.[178] In all of these situations, the physician is likely to be seen on a chance basis and may well serve only as a figurehead to services provided by nurses and other technical assistants. Thus, it is questionable whether the modern patient establishes the type of patient-physician relationship envisioned by the creators of the learned intermediary doctrine.

In addition, diet and exercise are being increasingly realized as valuable in the treatment of common diseases.[179] As diet and exercise programs continue to develop, they may eventually displace to some extent medication as standard treatment. In the future, an individual ingesting a prescription drug might truly be doing so of his own reasoned choice because alternative diet and exercise regimens are unsuitable for his lifestyle. This situation is readily analogous to a woman's choice of the pill among various other forms of birth control and could consequently induce additional limitations on the learned intermediary doctrine. Finally, increased feasibility of direct patient warnings is certain to augment the growing list of prescription drugs requiring such information. In the era which spawned the learned intermediary doctrine, prescription drugs were most frequently shipped in bulk or as raw ingredients to be counted out or compounded by the local pharmacist.[180] Today, however, medication comes prepacked and sealed.[181] Thus, any warning label

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[176]*See generally* Katz, *Free-Standing Treatment Centers*, POSTGRADUATE MED., Aug., 1983, at 291.

[177]"Fast-food" medicine has generally been defined as the type of service a patient receives at free-standing emergency clinics, ambulatory surgery clinics, and birthing centers. *Id.* at 291. Basically, such a label denotes medical service received at facilities on a walk-in, first-come-first-served basis.

[178]See Katz, *Free-Standing Treatment Centers*, POSTGRADUATE MED., Aug., 1983, at 291; Mestarz, *HMO's Contracting with FEC's*, HOSP., July, 1984, at 36.

[179]*See, e.g.*, Harbcom, *Therapeutic Value of Graded Aerobic Exercise Training in Rheumatoid Arthritis*, 28 ARTHRITIS AND RHEUMATISM 32 (1985); *Diet and 20-Year Mortality Rates in Coronary Heart Disease*, 312 NEW ENG. J. MED. 811 (1985).

[180]Parker and Kilsoonk, *Drug Distribution: A Recap and Future Trends*, 1 TOPICS IN HOSPITAL PHARMACY MANAGEMENT 47, 49 (1981); *The Burger Opinion: What Pharmacists Had to Say*, NS16 JOURNAL OF AMERICAN PHARMACEUTICAL ASSOCIATION 492 (Sept., 1976); *Viewpoint: Hospital Pharmacy's Changing Roles*, 1 TOPICS IN HOSPITAL PHARMACY MANAGEMENT 87, 88 (1981).

[181]Parker and Kilsoonk, *Drug Distribution: a Recap and Future Trends,* 1 TOPICS AND HOSPITAL PHARMACY MANAGEMENT 47, 49 (1981).

affixed to the manufacturer's container could undoubtedly reach the product's ultimate consumer, the patient.[182] Such a deviation in distribution from that prevalent at the onset of the learned intermediary doctrine essentially eliminates one primary argument proffered in its favor: the general impractibility of requiring direct patient warnings. Thus, as new developments alter the complexion of medical care and pharmaceutical distribution, society's expectations of and dependence on the physician as learned intermediary are diminishing with a predictable concomitant increase of judicial limitations on the doctrine, once created to protect this almost sacrosanct patient-physician relationship. If such limitations are accompanied in the future by a judicial reliance on state negligence law as the determinative factor in deciding the adequacy of a given direct patient warning, that development is likely to lead to problems currently occurring in the vaccine industry: unpredictability and unlimited liability for the manufacturer with resultant unavailability for the consumer.

VII. Conclusion

The holdings of *MacDonald*, *Stephens*, and *Odgers* can generally be divided into two components. First, the manufacturer of oral contraceptives has a duty to warn the patient-consumer directly of risks inherent in the use of its product. Second, compliance with FDA patient package insert regulations is not determinative of a manufacturer's liability for failure to warn adequately. Determination of adequacy is to be left to the jury and based on concepts of state negligence law. The first of these components, the imposition of a duty to warn the consumer directly, represents a refusal to apply the doctrine of the learned intermediary, which would impose on the prescription drug manufacturer a duty to warn the consumer's physician only. Those reasons espoused by *MacDonald* and its progeny, namely the enhanced role of the healthy user in the choice of the pill, with a consequential reduction of the physician's role as learned intermediary, and the common practice of prescribing the pill for protracted periods of time, call for the revitalization of a common law duty to warn the user directly. In this era of increased public knowledge and concern regarding health, the imposition of a direct patient warning is to be applauded. In addition, certain societal factors forewarn that future courts may determine that other prescription drugs warrant additional limitations to the learned intermediary doctrine. Indeed, limitations may eventually swallow the rule, making the learned intermediary doctrine an artifact of only historical interest.

The second component of the holding of *MacDonald* and its progeny, the courts' refusal to determine a warning's adequacy based on com-

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[182] *See* Perez, *New Look to Prescription Drug Labeling*, Am. Pharmacy, Feb., 1981, at 39.

pliance with FDA regulations, must be seriously questioned. The judicially-espoused alternative requires determination of the warning's adequacy based upon a jury's interpretation of applicable state negligence law. Such a holding will lead to unpredictable and unlimited liability for the manufacturers of oral contraceptives and other prescription drug manufacturers if additional limitations on the learned intermediary doctrine are pronounced in the future. Consequently, pill producers and others may counter with selective distribution or withdrawal from the marketplace, actions which ultimately result in unavailability and increased costs for the patient-consumer. A better solution would be to work within the pre-existing regulatory framework, the FDA, to produce more comprehensible, patient-oriented warnings for oral contraceptives.

VICTORIA J. KINCKE

The Joint Participation Exception to the Marital Testimonial Privilege: Balancing the Interests "In Light of Reason and Experience"

I. Introduction

Since the adoption of the Federal Rules of Evidence in 1975, the Supreme Court of the United States has twice had the opportunity to recognize a joint participation exception to the marital testimonial privilege[1] in federal criminal cases. The Court declined both times[2] and thereby allowed a split of authority to develop in the circuit courts with respect to the recognition of such an exception. This split is evidenced by the recent decision in *In re Grand Jury Subpoena United States*.[3] In that case, the United States Court of Appeals for the Second Circuit vacated a district court order which found the defendant's wife in contempt for refusing to answer grand jury questions concerning her husband's alleged conspiracy to communicate national defense information to a foreign government. The wife was alleged to have participated with her husband in the illegal activities.[4] Her attempt to invoke the marital testimonial privilege was rejected by the federal district court based on the view that the privilege was subject to an exception for joint participation in criminal activity.[5] On appeal, the Second Circuit Court of Appeals held that the privilege against adverse spousal testimony is not subject to such an exception.[6] In so holding, the court aligned itself with decisions from the Third Circuit.[7] The Second Circuit's holding, however, was in direct conflict with decisions from the Seventh and Tenth Circuit Courts of Appeals that held that joint participation in criminal activity rendered the privilege inoperative.[8] The conflict in these decisions is rooted in

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[1]The marital testimonial privilege is sometimes referred to by courts and commentators as the privilege against adverse spousal testimony or the anti-marital facts privilege.

[2]*In re* Grand Jury Matter, 673 F.2d 688 (3d Cir.), *cert. denied sub nom.* United States v. Doe, 459 U.S. 1015 (1982); United States v. Trammel, 583 F.2d 1166 (10th Cir. 1978), *aff'd on other grounds*, 445 U.S. 40 (1980).

[3]755 F.2d 1022 (2d Cir. 1985), *vacated as moot sub nom.* United States v. Koecher, 106 S. Ct. 1253 (1986).

[4]*Id.* at 1022-23.

[5]*In re* Grand Jury Subpoena Koecher, 601 F. Supp. 385 (S.D.N.Y. 1984), *vacated sub nom. In re* Grand Jury Subpoena United States, 755 F.2d 1022 (2d Cir. 1985), *vacated as moot sub nom.* United States v. Koecher, 106 S. Ct. 1253 (1986).

[6]*In re* Grand Jury Subpoena United States, 755 F.2d at 1025.

[7]*In re* Grand Jury Matter, 673 F.2d 688; Appeal of Malfitano, 633 F.2d 276 (3d Cir. 1980).

[8]United States v. Clark, 712 F.2d 299 (7th Cir. 1983); United States v. Trammel, 583 F.2d 1166 (10th Cir. 1978); United States v. Van Drunen, 501 F.2d 1393 (7th Cir. 1974).

the courts' contrasting views of the public policy underlying the privilege and the varied means of dealing with the countervailing interests.

This Note will analyze the development of the joint participation exception to the marital testimonial privilege and examine the reasoning behind the conflicting decisions in light of the recognized justifications for the privilege. The Note will propose that the joint participation exception to the marital testimonial privilege be abrogated. In place of the exception, the federal courts should adopt a systematic procedure to weigh conflicting interests in order to circumvent the privilege in cases where the public interest mandates the admission of compelled spousal testimony.

II. Historical Development of the Marital Testimonial Privilege Through 1975

An analysis of the joint participation exception to the marital testimonial privilege requires a recognition that there are two distinct evidentiary privileges based on the marital relationship. The two privileges evolved from different policy considerations and are subject to different exceptions.[9] The confidential marital communications privilege prohibits the testimony of a spouse or an ex-spouse regarding confidential communications which arise out of the marital relationship.[10] Because the privilege is intended to promote communication between spouses without fear of disclosure in court, the privilege is possessed by the communicating spouse.[11] The marital testimonial privilege, to which this Note is addressed, is more sweeping than the communications privilege. It bars the prosecution from compelling a defendant's spouse to testify as to *any facts* contrary to the defendant's interest.[12] The predominant justification for the marital testimonial privilege is that it preserves marital harmony.[13] The privilege is currently held by the witness spouse

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[9] 8 J. Wigmore, Evidence §§ 2227, 2332 (McNaughton rev. 1961).

[10] *See* Blau v. United States, 340 U.S. 332 (1951) (confidential communications between husband and wife are privileged). This confidential marital communications privilege does not prevent testimony about communications which were not intended to be confidential. *See* Pereira v. United States, 347 U.S. 1 (1954) (communications made in presence of third party and communications intended to be conveyed to third party are not confidential); Tabbah v. United States, 217 F.2d 528 (5th Cir. 1954) (statements not intended to be confidential). *See generally* 8 J. Wigmore, *supra* note 9, §§ 2332-2341.

[11] 8 J. Wigmore, *supra* note 9, § 2340.

[12] *See generally id.* §§ 2227-45.

[13] *Id.* § 2228 at 216. Professor Wigmore noted a second justification for the privilege: There exists a "*natural repugnance* in every fair-minded person to compelling a wife or husband to be the means of the other's condemnation, and to compelling the culprit to the humiliation of being condemned by the words of his intimate life partner." *Id.* at 217 (emphasis in original). Although Wigmore characterized this argument as "the real and sole strength of the opposition to abolishing the privilege," he rejected it as "not

only.[14] Thus, a defendant spouse is unable to prevent voluntary testimony against him. The privilege ceases to exist when circumstances lead the court to recognize an exception to the privilege,[15] and under such circumstances the witness spouse may be compelled to testify to facts adverse to the defendant spouse.[16]

The marital testimonial privilege is linked historically to the rule of spousal incompetency.[17] The privilege emerged late in the sixteenth century[18] and thus antedated the rule of spousal incompetency by at least half a century.[19] Both evolved, at least in part, from the common law fiction that "husband and wife were not distinct individuals but a unified whole."[20] Parties were considered incompetent as witnesses at common law because of their strong motive for misstatement.[21] Thus, it was but a short step to declare spouses of parties incompetent under the anciently settled concept of "oneness in law."[22]

Because the common law rule that interested persons were incompetent was gradually abrogated,[23] it might well be thought the incompetency of one spouse to testify for or against the other would likewise

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more than a sentiment," and "not posit[ing] any direct and practical consequence of evil." *Id.*

[14]Trammel v. United States, 445 U.S. 40 (1980). *See also infra* text accompanying notes 74-81.

[15]8 J. WIGMORE, *supra* note 9, § 2239.

[16]*See* Shores v. United States, 174 F.2d 838, 841 (8th Cir. 1949) ("the wife, not being within the privilege . . . stood in the same position as any other victim of another's criminal act, in the matter of the state's right to compel her to testify").

[17]*See generally* 8 J. WIGMORE, *supra* note 9, § 2227 at 211.

[18]*See* Bent v. Allot, 21 Eng. Rep. 50 (Ch. 1580). Privileges have been traced to the Roman law where the basis for excluding testimony was twofold. First, there existed a general moral duty not to violate the underlying fidelity upon which protected relationships were built. Second, a member of a family, as an interested party, could not be believed because he had a strong motive for misstatement. It is unknown whether the Roman concept of privilege influenced the recognition of the privilege in England. The policies underlying the privileges, however, are remarkably similar. *See* Radin, *The Privilege of Confidential Communications Between Lawyer and Client*, 16 CALIF. L. REV. 487 (1928).

[19]Reutlinger, *Policy, Privacy, and Prerogatives: A Critical Examination of the Proposed Federal Rules of Evidence as They Affect Marital Privilege*, 61 CALIF. L. REV. 1353, 1363 (1973). "Although the two concepts are often combined or confused, they are, in fact, different in both policy and effect. Under the . . . rule of incompetency, testimony was not a matter of choice by either witness or party spouse; it was simply forbidden, as would be that of a person incapable of expressing himself or of understanding the duty to tell the truth. The testimonial privilege, on the other hand, . . . could be waived by the party spouse and was subject to certain exceptions . . . ." *Id.*

[20]*In re* Grand Jury Matter, 673 F.2d at 696 (Adams, J., dissenting).

[21]C. MCCORMICK, EVIDENCE § 66 at 144 (Cleary 2d ed. 1972).

[22]"If they were admitted to be witnesses for each other they would contradict one maxim of law, *nemo in propria causa testie esse debit* . . . ." ("No one ought to be a witness in his own case."). 1 E. COKE, A COMMENTARIE UPON LITTLETON 66 (1628).

[23]C. MCCORMICK, *supra* note 21, at 144.

be discarded. Nevertheless, it lingered because of a second reason adduced in its support — it fosters domestic harmony and prevents discord in a relationship fundamental to society.[24] Thus, it was, and to an extent still is, considered to be based on sound public policy.[25]

The much anticipated demise of the spousal incompetency disqualification came in the United States Supreme Court's 1933 decision in *Funk v. United States*.[26] In *Funk*, the petitioner was convicted in federal district court for conspiracy to violate the prohibition law. At his trial, the petitioner called his wife to testify on his behalf, but she was not allowed to do so pursuant to her disqualification as an incompetent witness.[27] The Fourth Circuit affirmed the conviction.[28] The Supreme Court granted certiorari to decide "whether in a federal court, the wife of the defendant on trial for a criminal offense is a competent witness in his behalf."[29] The Court noted that "a rule of evidence at one time thought necessary to the ascertainment of truth should yield to the experience of a succeeding generation whenever that experience has clearly demonstrated the fallacy or unwisdom of the old rule."[30] After observing the "manifest incongruity" of preventing a wife from testifying on behalf of her husband while permitting the husband to testify for himself,[31] the Court held that spouses are competent to testify in favor of one another.[32]

The question of whether a wife is a competent witness *against* her husband in the trial in which he is charged with a criminal offense was left open until 1958, when the Court, in *Hawkins v. United States*,[33] clearly set forth the rule that controlled the marital testimonial privilege for the following twenty-two years.[34] In *Hawkins*, the petitioner was arrested for violating the Mann Act after transporting a girl from Arkansas to Oklahoma to have her engage in prostitution. Despite the

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[24]5 B. JONES, COMMENTARIES ON THE LAW OF EVIDENCE § 2128 at 4000-01 (2d ed. 1926).

[25]*Id.*

[26]290 U.S. 371 (1933).

[27]*Id.* at 373.

[28]Funk v. United States, 66 F.2d 70 (4th Cir. 1933).

[29]290 U.S. at 373.

[30]*Id.* at 381.

[31]*Id.*

[32]*Id.* at 387. The United States Court of Appeals for the Tenth Circuit addressed the question whether a wife is a competent witness *against* her husband in a federal criminal case in *Yoder v. United States*, 80 F.2d 665 (10th Cir. 1935). After recognizing that the question had not been authoritatively decided in *Funk*, the court observed trends challenging the denial of access to facts and committed itself to the view that a wife is a competent witness against her husband. *Id.* at 668. The Supreme Court expressly overruled *Yoder* twenty-two years later in Hawkins v. United States, 358 U.S. 74 (1958).

[33]358 U.S. 74 (1958).

[34]*See infra* text accompanying notes 74-81.

petitioner's objection, the district court allowed the girl, who had since become the petitioner's wife, to testify against him.[35] The petitioner was convicted and sentenced to five years imprisonment.[36] After the Tenth Circuit affirmed the decision,[37] the Supreme Court granted certiorari to decide whether to reject the longstanding rule prohibiting one spouse from testifying against the other without mutual consent. Justice Black observed:

> While the rule forbidding testimony of one spouse *for* the other was supported by reasons which time and changing legal practices had undermined, we are not prepared to say the same about the rule barring testimony of one spouse *against* the other. The basic reason the law has refused to pit wife against husband or husband against wife in a trial where life or liberty is at stake was a belief that such a policy was necessary to foster family peace, not only for the benefit of husband, wife and children, but for the benefit of the public as well. Such a belief has never been unreasonable and is not now.[38]

Thus, the Court held that one spouse is barred from testifying against the other unless both consent.[39] The *Hawkins* rule, however, was tempered by the Court's recognition that the privilege remained open to further modification. Justice Black noted that "this decision does not foreclose whatever changes in the rule may eventually be dictated by 'reason and experience.' "[40] This concept was manifested by Congress' enactment in 1975 of Federal Rules of Evidence, Rule 501,[41] which provides:

> Except as otherwise required by the Constitution of the United States or provided by Act of Congress or in rules prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witness, person, government, State, or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience. . . .[42]

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[35]358 U.S. at 74-75.

[36]*Id.* at 74.

[37]Hawkins v. United States, 249 F.2d 735 (10th Cir. 1957).

[38]358 U.S. at 77.

[39]*Id.* at 79.

[40]*Id.*

[41]*See generally* 1 BAILEY AND TRELLES, THE FEDERAL RULES OF EVIDENCE: LEGISLATIVE HISTORIES AND RELATED DOCUMENTS (1980).

[42]FED. R. EVID. 501. Congress substituted this single rule in place of thirteen proposed rules dealing with specific privileges drafted by the Judicial Conference Advisory Committee and prescribed by the Supreme Court. *See* FED. R. EVID., *Appendix of Deleted and*

In enacting rule 501, Congress intended to leave the law of privilege in its present state and to "provide the courts with the flexibility to develop rules of privilege on a case-by-case basis."[43]

III. The Joint Participation Exception

The common law recognized that the marital testimonial privilege was subject to an exception based on the "necessity to avoid that extreme injustice to the excluded spouse which would ensue upon an undeviating enforcement of the rule."[44] Most commonly, the exception emerged in those situations involving a crime against the spouse.[45]

In federal criminal cases, courts have continued to recognize that the privilege ceases to exist when one spouse commits a crime against the other.[46] The courts have also created exceptions when a spouse commits a crime against the other's children or property,[47] when two persons enter into a sham marriage for the exclusive purpose of obtaining the benefits of the privilege,[48] and when the marriage relationship is recognized to be beyond preservation and without hope of reconciliation.[49]

Superseded Materials, Rules 501-13. The language of rule 501 is taken from former rule 26, Federal Rules of Criminal Procedure, which previously governed the admissibility of evidence in federal courts. The language of Federal Rule of Criminal Procedure 26 was taken from the decision in Wolfle v. United States, 291 U.S. 7, 12 (1934), in which the Supreme Court stated:

> [T]he rules governing the competence of witnesses in criminal trials in the federal courts are not necessarily restricted to those local rules in force at the time of the admission into the Union of the particular state where the trial takes place, but are governed by common law principles as interpreted and applied by the federal courts in the light of reason and experience.

[43]120 Cong. Rec. H12253 (daily ed. Dec. 18, 1974) (statement of Rep. Hungate), *reprinted in* 1974 U.S. Code Cong. & Ad. News 7108. From the outset, it was clear that the content of the proposed privilege provision was extremely controversial. The Chairman of the House Judiciary Subcommittee on Criminal Justice, upon presenting the Conference Report to the House, stated:

> Without doubt, the privilege section of the rules of evidence generated more comment or controversy than any other section. I would say that 50 percent of the complaints received by the Criminal Justice Subcommittee related to the privilege section. The House rule on privilege is intended to leave the Federal law of privilege where we found it. The Federal courts are to develop the law of privilege on a case-by-case basis.

Id.

[44]8 J. Wigmore, *supra* note 9, § 2239 at 242.

[45]*Id.*

[46]*E.g.*, Wyatt v. United States, 362 U.S. 525 (1960) (wife-victim compelled to testify in husband's trial).

[47]*E.g.*, United States v. Allery, 526 F.2d 1362 (8th Cir. 1975) (wife compelled to testify against husband for his attempted rape of daughter); Herman v. United States, 220 F.2d 219 (4th Cir. 1955) (wife's testimony to grand jury for husband's fraud).

[48]*See, e.g.*, United States v. Apodaca, 522 F.2d 568 (10th Cir. 1975).

[49]*See* United States v. Cameron, 556 F.2d 752 (5th Cir. 1977) (marriage beyond hope of reconciliation). *But cf.* United States v. Lilley, 581 F.2d 182, 189 (8th Cir.

A. Development of the Joint Participation Exception Under Hawkins

1. United States v. Van Drunen. — In 1974, the Seventh Circuit Court of Appeals became the first federal court of appeals to recognize an exception to the marital testimonial privilege when both spouses participate in criminal activity. In *United States v. Van Drunen*,[50] the defendant was convicted of illegal transportation of aliens, one of whom became his wife. On appeal, the defendant, relying on *Hawkins*, claimed that the trial court erred in refusing to exclude his wife's testimony.[51] Although the case was one of first impression, the court observed that an exception to the somewhat related privilege of confidential communications was recognized when the communications involved unlawful activities in which both spouses participated.[52] Persuaded that preservation of the family was the underlying reason for both privileges, the court seized the opportunity to create a joint participation exception to the marital testimonial privilege.[53]

The primary rationale for the decision in *Van Drunen* was that the purpose of the privilege was outweighed by the unjust protection which "assur[es] a criminal that he can enlist the aid of his spouse in a criminal enterprise without fear that by recruiting an accomplice or co-conspirator he is creating another potential witness."[54] This reasoning had merit in light of the *Hawkins* rule that the witness spouse was precluded from testifying without the defendant's consent. Nevertheless, it had questionable applicability to the facts of the case. First, the witness was not the defendant's spouse at the time that he "enlisted" her aid in the crime.[55] Second, it is unclear from the case whether the witness spouse's testimony was even necessary for the defendant's conviction. If sufficient witnesses were available to obtain a conviction, disallowing the privilege appears to violate the spirit of the *Hawkins* rule by causing unnecessary conflict in the marriage.

A second reason intimated by the court for recognizing the exception was that preservation of the marriage was socially more desirable when the marriage might assist the defendant in his or her rehabilitation efforts; if the witness spouse is a participant in the crime, this partial function of the privilege is defeated.[56] This reasoning presupposes that a witness

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1978) (court refused to condition the privilege "on a judicial determination that the marriage is a happy or successful one").

[50]501 F.2d 1393 (7th Cir.), *cert. denied*, 419 U.S. 1091 (1974).

[51]*Id.* at 1396.

[52]*Id.* (citing United States v. Kahn, 471 F.2d 191 (7th Cir.), *rev'd on other grounds*, 415 U.S. 143 (1972)).

[53]*Id.*; *see also infra* note 110 and accompanying text.

[54]501 F.2d at 1396.

[55]This fact provided an alternative ground for barring the privilege. The court held that another exception to the privilege arises when the facts to which the witness spouse testifies occured prior to the marriage. *Id.* at 1397.

[56]*Id.*

spouse who has participated in the criminal activity is less likely to aid in rehabilitative efforts than a spouse who is not a participant. The idea leaves no room for considering a spouse's potential contribution to the defendant's rehabilitation on a case-by-case basis. The court failed to cite any authority for this proposition, and no subsequent decisions indicate that other courts have found this reasoning persuasive.[57]

The *Van Drunen* court did not view *Hawkins* as dispositive of the issue. It noted that even if the *Hawkins* case were treated as one involving joint criminal activity, the *sub silentio* holding that the marital testimonial privilege remains in such a case is of diminished precedential value.[58] Moreover, the court noted that the Supreme Court's post-*Hawkins* decision in *Wyatt v. United States*[59] had announced an exception to the privilege when one spouse commits a crime against the other.[60] Thus, the Seventh Circuit declined to read *Hawkins* as foreclosing the creation of other exceptions.[61]

The problems with the *Van Drunen* court's application of *Hawkins* and *Wyatt* are two-fold. First, the exception in *Wyatt* was not a newly-created exception to the marital testimonial privilege. Rather, it was based on over three hundred years of common law precedent.[62] Second, the spousal-victim exception to the privilege is based on the view that the purpose of the privilege, preserving domestic harmony, would not be served in such a case. A crime against one's spouse is indicative of a marriage which is beyond preservation.[63] In the *Van Drunen* case, the court did not suggest that the marriage was unworthy of protection for any reason. Rather, the court found only that the public interest dictated that the privilege should be limited "to those cases where it makes the most sense, namely, where a spouse who is neither a victim nor a participant observes evidence of the other spouse's crime."[64]

2. United States v. Trammel. — In 1978, the reasoning in the *Van Drunen* opinion persuaded the Tenth Circuit Court of Appeals to recognize the joint participation exception to the marital testimonial privilege in *United States v. Trammel*.[65] *Trammel* involved a husband and wife who became extensively involved in criminal activity shortly following their marriage. Otis Trammel, along with two others, was indicted for

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[57]*See In re* Grand Jury Subpoena Koecher, 601 F. Supp. at 389 ("*Van Drunen* cited [no] authority for the proposition . . . and this Court can find none.").

[58]501 F.2d at 1397.

[59]362 U.S. 525 (1960).

[60]501 F.2d at 1397.

[61]*Id.*

[62]8 J. WIGMORE, *supra* note 9, § 2239.

[63]*Id.*

[64]501 F.2d at 1397.

[65]583 F.2d 1166 (10th Cir. 1978), *aff'd on other grounds*, 445 U.S. 40 (1980).

importation and conspiracy to import heroin.[66] Trammel's wife was arrested while returning from Thailand when a customs search revealed heroin in her possession. She agreed to testify as a government witness against her husband and the other conspirators under a grant of immunity.[67]

At a hearing on a motion to sever his case from the other defendants, Otis Trammel asserted both the marital testimonial privilege and the confidential marital communications privilege. The district court ordered that all confidential communications were to be excluded, yet denied Otis Trammel's assertion of the marital testimonial privilege. Accordingly, the wife was permitted to give testimony which resulted in Otis Trammel's conviction.[68] Except for the testimony of Trammel's wife, there was no other evidence presented against Otis Trammel from which a jury could have convicted him.[69]

On appeal, the Tenth Circuit upheld the conviction and ruled that the *Hawkins* rule did not apply to the testimony of a spouse who appeared as an unindicted co-conspirator under a grant of immunity.[70] The court recognized, in keeping with the mandate of Federal Rule of Evidence 501, that it had the right and responsibility to determine whether "reason and experience" dictated alteration of the privilege in this case. Persuaded that *United States v. Van Drunen* provided the applicable rule and reason upon which to base its decision, the court concluded that the privilege, based on the policy of preserving domestic harmony, had to give way to the more compelling public need for the testimony necessary to convict Otis Trammel.[71] The court failed to articulate why joint participation in criminal activity makes a marital relationship less worthy of protection.

In a dissenting opinion, one judge was unconvinced that the record supported the majority's finding that the Trammels had not established a home with any of the usual attributes of a family life and that there was no domestic harmony to be preserved.[72] He suggested that the majority's findings reflected the view that "spouses who commit crimes are incapable of achieving a harmonious marriage."[73]

3. Modification of the Hawkins *Rule.* — In 1980, the Supreme Court of the United States unanimously affirmed Otis Trammel's conviction, but on different grounds.[74] The Court ignored the joint partic-

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[66]*Id.* at 1167.
[67]*Id.*
[68]*Id.*
[69]445 U.S. at 43.
[70]583 F.2d at 1169.
[71]*Id.* at 1169-70.
[72]*Id.* at 1173 (McKay, J., dissenting).
[73]*Id.*
[74]445 U.S. 40.

ipation exception and seized the opportunity to alter the *Hawkins* rule by allowing the witness spouse to give voluntary testimony against the defendant spouse without the defendant's consent.[75]

The Court recognized that the long history of the privilege and its tendency to protect domestic harmony suggested that it should not be casually set aside.[76] Nevertheless, the Court echoed the sentiments articulated in *Funk v. United States*[77] by noting that "the reality that the law on occasion adheres to doctrinal concepts long after the reasons which gave them birth have disappeared and after experience suggests the need for change."[78]

After reviewing the significant erosion and criticism of the marital testimonial privilege in state jurisdictions, Chief Justice Burger noted that the trend toward rejection of the privilege was based on the maxim that " 'the public . . . has a right to every man's evidence.' "[79] Thus, the Court stated that the appropriate analysis in this case was to "decide whether the privilege against adverse spousal testimony promotes sufficiently important interests to outweigh the need for probative evidence in the administration of criminal justice."[80] After finding the ancient foundation and contemporary justifications for the *Hawkins* rule unpersuasive, the Court held:

> "[R]eason and experience" no longer justify so sweeping a rule. . . . Accordingly, we conclude that the existing rule should be modified so that the witness-spouse alone has a privilege to refuse to testify adversely; the witness may be neither compelled to testify nor foreclosed from testifying. This modification — vesting the privilege in the witness-spouse — furthers the important public interest in marital harmony without unduly burdening legitimate law enforcement needs.[81]

In light of the *Trammel* holding that a "witness may be neither compelled to testify nor foreclosed from testifying," it should be noted that the Supreme Court did not preclude recognition or creation of exceptions to the marital testimonial privilege. Thus, compelling a witness spouse to testify does not violate the *Trammel* holding when circumstances give rise to an exception.

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[75] *Id.* at 53. The *Trammel* decision did not affect the independent marital communications privilege. The Court expressly noted the need to protect confidential communications between husband and wife, priest and penitent, attorney and client, and physician and patient. *Id.* at 51.

[76] *Id.* at 48.

[77] 290 U.S. 371 (1933).

[78] 445 U.S. at 48.

[79] *Id.* at 50 (quoting United States v. Bryan, 339 U.S. 323, 331 (1950)).

[80] *Id.* at 51.

[81] *Id.* at 53.

B. The Joint Participation Exception Following Trammel

1. Appeal of Malfitano. — The Third Circuit Court of Appeals unanimously rejected the recognition of the joint participation exception in *Appeal of Malfitano*,[82] a case in which the government claimed that a wife and husband were co-offenders in a scheme to obtain illegal loans from a union pension fund. The district court denied the wife's attempt to assert the marital testimonial privilege based on her alleged joint participation in the criminal activity.[83] Upon her refusal to testify, the district court issued an order holding her in contempt.[84] On appeal, the Third Circuit emphatically rejected a broad rule that marriages involving partners in crime should not be protected.[85] Instead, the court sought to determine only whether the rationale of the marital testimonial privilege would be served in that case.[86]

The court's rejection of the joint participation exception was based on four underlying observations. First, the court could find no public policy supporting the proposition that a marriage should be dissolved when the partners engage in crime. The court detected an impropriety in using evidentiary rules to impose a penalty on a marital relationship when neither state nor federal substantive law attaches such a penalty to spouses engaged in a crime.[87]

Second, the court observed that the marital relationship may deserve protection because of its rehabilitative effect on the individuals and its "restraining influence on couples against future antisocial acts."[88] These first two arguments assume that compelling a witness spouse to testify will tend to trigger a marital dissolution. This hypothetical impact on the marital relationship, however, has little or no evidentiary support in behavioral science.[89]

Third, the court conceded that the joint participation exception might be justified in cases where a particular marriage has no social value. The court was not confident, however, that judicial tribunals are capable of assessing the social worthiness of particular marriages.[90]

Finally, the court indicated a concern that recognition of the joint participation exception would open the door for prosecutorial abuse. The court stated, "[T]he very nature of conspiracy cautions against this exception. . . . Where the spouse does not want to testify, the only way

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[82]633 F.2d 276 (3d Cir. 1980).
[83]*Id.* at 277.
[84]*Id.* at 276.
[85]*Id.* at 278.
[86]*Id.*
[87]*Id.*
[88]*Id.*
[89]*See* Rosenburg, *The New Looks in Law*, 52 MARQ. L. REV. 539, 541-42 (1969).
[90]633 F.2d at 279.

to get her testimony will be to accuse her."[91] This concern is persuasive in light of the fact that conspiracy is such a flexible concept. A similar problem already exists under the *Trammel* rule vesting the privilege in the witness spouse. Under *Trammel*, the government may accuse a defendant's spouse of conspiracy and then dismiss the charge in return for "voluntary" testimony. The witness spouse could, however, refuse to testify without fear of being held in contempt. Recognition of the joint participation exception would carry the problem one step further. If the government successfully charged the spouse as a co-conspirator, the government could compel the witness spouse to testify without any agreement to dismiss the charge. If the witness spouse refused, a contempt order would issue.

Neither the Seventh nor the Tenth Circuit Courts of Appeals have addressed this problem of potential prosecutorial abuse. Neither has suggested, however, that a simple allegation of conspiracy would be an adequate basis for recognizing the exception. Presumably, the government would have to make an adequate offer of proof regarding the spouse's participation in joint criminal activity.

The primary distinction between *Malfitano* and those cases recognizing the joint participation exception is that the *Malfitano* court's analysis focused on whether the policy underlying the privilege would be served in that particular case. The Seventh and Tenth Circuits attempted to balance the underlying policy against the unjust protection of joint participants in criminal activity. Although the *Malfitano* court recognized that "[i]n any case where a proposed exception to a privilege is asserted there must be a balancing of the need for the evidence against the validity of the privilege,"[92] the court failed to analyze what, if any, specific countervailing considerations pertaining to the public's interest in ascertaining the truth might justify a denial of the privilege.

2. United States v. Clark.—The Seventh Circuit Court of Appeals followed its *Van Drunen* holding in *United States v. Clark*,[93] the only post-*Trammel* decision to recognize the joint participation exception to the marital testimonial privilege. Prior to their marriage, Richard Clark and his wife, Christine, were involved in a scheme to steal money from a bank where Christine worked. She set up an account in the name of "Eric Westberg" and allegedly caused two cashier's checks to be drawn

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[91] *Id.* This observation echoes the concern articulated by Justice Stewart twenty-two years earlier. When considering whether to vest the privilege solely in the witness spouse, he noted:

> [S]uch a rule would be difficult to administer and easy to abuse. Seldom would it be a simple matter to determine whether the spouse's testimony were really voluntary, since there would often be ways to compel such testimony more subtle than the simple issuance of a subpoena, but just as cogent.

Hawkins v. United States, 358 U.S. at 83 (Stewart, J., concurring).

[92] 633 F.2d at 280.

[93] 712 F.2d 299 (7th Cir. 1983).

on the account in the name of two of Clark's friends. The friends then gave the money to Clark. Clark was convicted for his role in the scheme and received a two-year sentence.[94] At Christine's trial, the government subpoenaed Clark as a hostile witness. Clark asserted the marital testimonial privilege. The district court found the privilege did not apply because of Clark's joint participation in the criminal activity. After Clark refused to testify, the court held him in contempt.[95]

The Seventh Circuit Court of Appeals upheld the contempt conviction because of Clark's joint participation in the crime.[96] The court expressly rejected the holding of the Third Circuit in *Malfitano*, complaining that the *Malfitano* court had failed to consider the principal rationale in *Van Drunen*.[97] The *Clark* court reaffirmed the *Van Drunen* position that the public interest in discouraging a criminal from enlisting the aid of his spouse as an accomplice outweighs the interest in protecting the marriage.[98] This rationale, however, retained only questionable vitality following the Supreme Court's holding in *Trammel* granting the privilege to the witness spouse only. Because a defendant can no longer prevent a spouse from testifying, a criminal can no longer be assured that he can enlist the aid of his spouse without creating another potential witness.[99]

The creation of the joint participation exception in *Van Drunen* was necessary to obtain voluntary testimony. The *Clark* court, however, failed to reassess the rationale or articulate any additional justification for using the exception to compel spousal testimony. The *Clark* court merely deemed it consistent with the general policy of narrowly construing the privilege.[100] Moreover, the court did not suggest that the marriage was unworthy of protection. It spoke of balancing interests, yet it applied the joint participation exception as a rigid evidentiary rule. In so doing, the court pigeonholed the case and based its decision on established precedent rather than subjecting the facts to careful scrutiny and balancing the specific interests.[101]

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[94] *Id.* at 300.

[95] *Id.*

[96] *Id.* at 300-02. The court also relied on the rationale that the acts about which Clark would have testified occurred prior to marriage. *Id.* at 302. The Seventh Circuit had previously created this "pre-marital facts" exception in *United States v. Van Drunen* because of a concern that collusive marriages would interfere with the factfinding process. *Id.* The *Clark* court found such a general rule desirable to avoid "mini-trials" on the issue of sincerety of the parties' marriage. *Id.*

[97] 712 F.2d at 301-02.

[98] *Id.* at 302.

[99] *See In re* Grand Jury Subpoena Koecher, 601 F. Supp. 385, 389 (S.D.N.Y. 1984) ("[S]ince *Trammel*, a defendant can no longer prevent his spouse from voluntarily testifying against him. The assurance the *Van Drunen* court spoke of is thus no longer absolute — it accrues only to a criminal with a loyal spouse.").

[100] 712 F.2d at 302.

[101] As one commentator noted, "[T]he [*Clark*] opinion . . . is unsound, and it strikes in the most outrageous way at the very heart of the privilege. . . . [T]he only real question

3. In re Grand Jury Subpoena United States. — In February, 1985, the Second Circuit Court of Appeals held, in agreement with the Third Circuit and in conflict with the Seventh and Tenth Circuits, that the marital testimonial privilege is not subject to a joint participation exception.[102] In vacating the district court's contempt order against the defendant's wife, the court noted that if the Supreme Court had looked upon the joint participation exception with favor, it was peculiar that it affirmed the *Trammel* case on different grounds.[103]

The Second Circuit rejected the rationale supporting the exception in *Van Drunen*. Since *Trammel*, "[a] person desiring to enlist the aid of his spouse as an accomplice . . . takes the risk that the spouse may choose to testify."[104] As for the *Van Drunen* court's assertion that in circumstances of joint participation, the marriage is less likely to contribute to the defendant's rehabilitation, the Second Circuit stated, "[R]ehabilitation ha[s] never been regarded as one of the interests served by the spousal privilege and . . . participation in a joint crime would not necessarily remove the remorse which would trigger rehabilitation."[105]

The court also rejected the government's attempt to analogize the joint participation exception to similar exceptions applicable to the attorney-client privilege and the confidential marital communications privilege. For example, courts recognize an exception to the attorney-client privilege for communications made to enable or aid anyone to commit a crime.[106] Also, a number of jurisdictions recognize an exception to the confidential marital communications privilege when the communications are made in furtherance of a criminal activity.[107] In disposing of the first analogy, the Second Circuit merely asserted that "[t]he attorney-client relationship, valuable as it is, is hardly of the same social importance as that of husband and wife."[108] With respect to the confidential marital communications privilege, the court noted a distinction between the purposes of the marital testimonial privilege and the confidential marital communications privilege. The communications privilege seeks to promote communications by protecting their intimacy. Those

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which remains after such an assault on the privilege is whether there is enough left to be worth preserving." D. LOUISELL AND C. MUELLER, FEDERAL EVIDENCE § 218 at 407 (Supp. 1984).

[102]*In re* Grand Jury Subpoena United States, 755 F.2d 1022, *vacated as moot sub nom.* United States v. Koecher, 106 S. Ct. 1253 (1986).

[103]*Id.* at 1026.

[104]*Id.*

[105]*Id.*

[106]*See, e.g., In re* John Doe Corp., 675 F.2d 482 (2d Cir. 1982).

[107]*See, e.g.*, United States v. Kapnison, 743 F.2d 1450 (10th Cir. 1984); United States v. Neal, 743 F.2d 1441 (10th Cir. 1984), *cert. denied*, 105 S. Ct. 1848 (1985); United States v. Broome, 732 F.2d 363 (4th Cir.), *cert. denied*, 105 S. Ct. 181 (1984).

[108]755 F.2d at 1027.

discussions regarding criminal activity are justifiably excluded from protection. The marital testimonial privilege, however, is concerned with protecting domestic harmony. Thus, compelled testimony may cause the debilitating effect on the marriage which the privilege was designed to avoid.[109]

This reasoning is flawed in two respects. First, compelled testimony involving confidential communications may also cause a negative impact that the communications privilege was designed to protect. Forcing disclosure of communications intended to be confidential may have a chilling effect on husband-wife communications. Second, courts and commentators are not all in agreement on the purpose of the confidential communications privilege. Some would suggest that the purpose underlying both privileges is to protect marital harmony.[110] If the purpose of the two privileges is identical, then an exception which permits the introduction of confidential communications but bars all other testimony seems illogical.[111]

Another factor persuading the Second Circuit to reject the joint participation exception was the difficulty of establishing the witness spouse's role in the criminal activity without invalidating the privilege.[112] This argument echoes the *Malfitano* court's concern with prosecutorial abuse.[113] In *In re Grand Jury Subpoena United States*, the witness spouse continually maintained that she did not participate in her husband's affairs, despite their twenty-one-year marriage. The court was reluctant to find that their close marriage provided a sufficient basis to conclude that both spouses were involved in the alleged conspiracy.[114]

In concluding its opinion, the Second Circuit indicated its reluctance to assume a definite responsibility for any modification of the privilege: "[I]n light of its existence since the early days of the common law and of the importance of the interests which the marital privilege serves, we would leave the creation of exceptions to the Supreme Court or to Congress."[115]

In taking a conservative approach, the court failed to articulate what countervailing interests might be at stake. Because the case arose in the context of espionage and concerns with national security, the case raises questions regarding the public's substantial interest in ascertaining the

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[109]*Id.* at 1027-28.

[110]*See* United States v. Price, 577 F.2d 1356 (9th Cir. 1978); United States v. Mendoza, 574 F.2d 1373 (5th Cir. 1978).

[111]*See In re* Grand Jury Subpoena Koecher, 601 F. Supp. at 390.

[112]755 F.2d at 1028.

[113]*See* Appeal of Malfitano, 633 F.2d at 299; *see also supra* text accompanying note 91.

[114]755 F.2d at 1028.

[115]*Id.*

truth. The court interpreted the marital testimonial privilege and Federal Rule of Evidence 501 in a manner indicating its eagerness to protect the marriage from society. In so doing, the court may have failed to protect society from the marriage.

IV. Reconciling The Differences: A Proposed Solution

Although evidentiary rules protecting marital harmony have prevailed for over four hundred years in Anglo-American jurisprudence, they have been subjected to numerous attacks.[116] Critics of the marital testimonial privilege argue that the stability of the family depends little upon a spouse's immunity from compulsory testimony,[117] that it is unjust and illogical to permit a wrongdoer to secure immunity from giving redress in the name of preserving his own marital peace,[118] and that there is an inconsistency in providing the privilege to spouses while denying it to parents, children, and siblings, because the peace of the family is no less dependent on the harmony of those relationships.[119] Ultimately, society may benefit more from the marital partners' incarceration than it would from making every effort to preserve their marital relationship.

The exclusionary effect of the marital testimonial privilege is also inconsistent with the general principle that "the public has a right to every man's evidence." Limitations upon this principle are acceptable "only to the very limited extent that permitting a refusal to testify or excluding relevant evidence has a public good transcending the normally predominant principle of utilizing all rational means for ascertaining the truth."[120] Thus, the Supreme Court has admonished the judiciary to construe privileges narrowly.[121]

It is clear today that the marital testimonial privilege is to be construed in accordance with its purpose of protecting the family as a socially beneficial institution. Like other rules of exclusion, however, it should not be applied without a judicial inquiry into whether the application will promote its objectives sufficiently to justify the substantial cost to society of excluding probative evidence.[122]

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[116]*See* 8 J. Wigmore, *supra* note 9, § 2228 at 216-17; C. McCormick, *supra* note 21, § 66 at 162-63 ("The privilege is an archaic survival of a mystical religious dogma and a way of thinking about the marital relation that is today outmoded."); *see also* Comment, *Questioning the Marital Privilege: A Medieval Philosophy in a Modern World*, 7 Cumb. L. Rev. 307 (1976).

[117]*See* 8 J. Wigmore, *supra* note 9, § 2228 at 216. *See generally* Hutchins and Slesinger, *Some Observations on the Law of Evidence: Family Relations*, 13 Minn. L. Rev. 675, 682 (1929).

[118]8 J. Wigmore, *supra* note 9, § 2228 at 216-17.

[119]*Id.* at 217 n.2.

[120]Trammel v. United States, 445 U.S. at 50 (quoting Elkins v. United States, 364 U.S. 206, 234 (1960) (Frankfurter, J., dissenting)).

[121]*See* United States v. Nixon, 418 U.S. 683, 710 (1974).

[122]The Supreme Court, for example, has held that a balancing test weighing the costs and benefits of preventing the use of evidence seized in violation of the fourth amendment

Most courts have consistently allowed the marital testimonial privilege to be asserted unless circumstances indicate that the particular marriage is undeserving of protection. Some courts, however, have gone beyond a judicial determination of whether the marriage is worthy of protection. They have sought to decide whether the countervailing interest in receiving material information outweighs the concern for protecting marital harmony. A classic example of this type of analysis is found in *United States v. Allery*.[123] In *Allery*, the defendant was convicted of the attempted rape of his daughter following damaging testimony from his wife.[124] Analyzing the marital testimonial privilege "in light of reason and experience," the United States Court of Appeals for the Eighth Circuit held that an exception to the privilege exists in cases involving crimes against either spouse's child.[125] The court stated:

> We recognize that the general policy behind the husband-wife privilege of fostering family peace retains vitality today as it did when it was first created. But, we also note that a serious crime against a child is an offense against that family harmony and to society as well. Second, we note the necessity for parental testimony in prosecutions for child abuse. It is estimated that over ninety percent of reported child abuse cases occurred in the home, with a parent or parent substitute the perpetrator in eighty-seven and one-tenth percent of these cases. Third, we recognize that . . . "[a]ny rule that impedes the discovery of truth in a court of law impedes as well the doing of justice."[126]

A spouse's crime committed against his child is not necessarily indicative of a marriage relationship which is unworthy or undeserving of protection. Yet, the *Allery* court determined that the problem of child abuse in the home outweighs any concern with marital tranquility.[127]

The disagreement among the federal circuit courts of appeals in recognizing the joint participation exception may be partially explained by the courts' different modes of analysis. Both approaches are policy oriented, but each emphasizes different factors. The Second and Third Circuits, in rejecting the joint participation exception, seek to determine only if the purpose of the privilege would be served by allowing the privilege to be asserted.[128] This approach takes the view that joint

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be used rather than indiscriminately applying the exclusionary rule. *See* United States v. Leon, 104 S. Ct. 3405 (1984); *see also* Stone v. Powell, 428 U.S. 465 (1976); United States v. Janis, 428 U.S. 433 (1976).

[123]526 F.2d 1362 (8th Cir. 1975).

[124]*Id.* at 1363.

[125]*Id.* at 1367.

[126]*Id.* at 1366 (citations omitted); *see also* Note, United States v. Allery, 7 CUMB. L. REV. 177 (1976).

[127]526 F.2d at 1366.

[128]*See supra* text accompanying notes 82-93, 102-15.

participation by spouses in criminal activity is not necessarily indicative of a marriage undeserving of protection. These courts, however, ignore the countervailing interests. The Seventh and Tenth Circuits, on the other hand, look beyond the question of whether the purpose of the privilege would be served and attempt to balance the conflicting interests.[129] In *United States v. Clark*, however, the Seventh Circuit viewed the joint participation exception as a rigid evidentiary principle and applied the exception without even considering whether the purpose of the privilege would be served in that particular case.[130]

In an effort to remedy possible unjust assertions of the marital testimonial privilege, the federal courts should adopt a systematic balancing test. Such a test could serve to protect the marital relationship yet allow the privilege to be circumvented in those cases where the public's interest mandates the admission of compelled spousal testimony. Such a process would necessarily involve an evaluation of the privilege in light of the specific facts on a case-by-case basis. Courts and commentators have expressly acknowledged the need to balance competing considerations in determining whether a privilege should be allowed in a particular case.[131]

The probable effect of adverse spousal testimony on a particular marriage, as well as the damage that exclusion of the testimony would do to the factfinding process, will vary substantially from case to case. Although it would be difficult to establish criteria of general application that will strike the best balance in all cases, it would be essential that a case-by-case evaluation of the privilege initially involve a judicial assessment of whether the particular marriage deserves protection. Should the court find the marriage unworthy of protection, assertion of the privilege should be denied. When a particular marriage is deemed worthy of protection, however, the court should carefully weigh society's interest in protecting the marriage against several factors. These factors include the nature and magnitude of the crime involved, whether the testimony is expected to be material, and whether the information sought to be introduced could be obtained from a less intrusive source. Completion of the balancing process would then require the court to consider the extent of the potential harm to the marriage itself.

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[129]United States v. Trammel, 583 F.2d 1166; United States v. Van Drunen, 501 F.2d 1393; *see also supra* text accompanying notes 50-73.

[130]712 F.2d 299; *see also supra* text accompanying notes 93-101.

[131]*E.g.*, Ryan v. Commissioner of Internal Revenue, 568 F.2d 531, 543 (7th Cir. 1977), *cert. denied*, 439 U.S. 820 (1978); United States v. Cameron, 556 F.2d 752, 756 (5th Cir. 1977); Reutlinger, *Policy, Privacy, and Prerogatives: A Critical Examination of the Proposed Federal Rules of Evidence as They Affect Marital Privilege*, 61 CAL. L. REV. 1353, 1391 (1973) ("[R]ather than abolish the testimonial privilege, I would merely leave it to the court's discretion to disallow it in exceptional circumstances where testimony is absolutely necessary in the interests of justice.").

Procedurally, a witness spouse, prior to trial or a grand jury hearing, should have an opportunity to assert the privilege by filing a request with the court. The government would then be required to present a summary of the nature of the knowledge the witness spouse is believed to have of the crime and the testimony expected to be elicited. The court would then make a preliminary decision as to whether an extensive hearing on the issue is required.

The approach is not free from imperfections. Critics argue that such an approach requires inquiry into collateral issues and that successful assertion of the privilege would be unpredictable, thereby leading to a further lack of uniformity in the federal courts.[132] With the privilege in its *present* form, however, partners to a marriage cannot now be certain that assertion of the privilege will be successful. A court's decision to grant or deny assertion of the privilege should be a determination of which interest is more important to society in specific situations. Such a determination does not guarantee that other societal interests will not suffer as a result. But because this balancing process considers both the marriage and the countervailing interests in obtaining material testimony, the effects of the harm will be minimized. Despite the inherent difficulties in conducting a balancing of interests on a case-by-case basis, the balancing approach would minimize the injustice that emanates from the rigid application of evidentiary rules and exceptions.

V. Conclusion

Whether there exists any real justification for the marital testimonial privilege remains the subject of debate. That the social policy of preserving marital harmony has no relation in fact to the privilege and is "merely a sentiment" will continue to be asserted by some and denied by others. Nevertheless, the Supreme Court has indicated that the privilege is not apt to disappear soon as an evidentiary concept. It is, however, subject to further modification.

The joint participation exception was created upon the premise that a marriage comprised of partners who engage in criminal activity is unworthy of the protection that the privilege affords. When the exception is applied without consideration of the actual need for the evidence, it undermines the policy supporting the privilege. Conversely, when the privilege itself is applied without consideration of countervailing interests, it undermines the public's interest in securing the truth.

Reconciling the opposing positions requires only that the courts adopt a systematic balancing test to weigh the conflicting interests on a case-by-case basis. Such a test is congruent with Congress' intent in enacting

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[132] *See* Note, *The Husband-Wife Testimonial Privilege in the Federal Courts*, 59 B.U.L. Rev. 894, 914, 917 (1979).

Federal Rule of Evidence 501.[133] Only through such a balancing approach can the contours of the marital testimonial privilege be shaped to strike the best balance between the competing interests of preserving marital harmony and securing material testimony in criminal proceedings.

JAMES CALVIN MCKINLEY

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[133]With regard to the application of common law privileges under Federal Rule of Evidence 501, the Report of the Senate Committee on the Judiciary stated:

> [I]n approving [Rule 501], the action of Congress should not be understood as disapproving any recognition of a . . . husband-wife or any other of the enumerated privileges contained in the Supreme Court rules. Rather, our action should be understood as reflecting the view that the recognition of a privilege based on a confidential relationship and other privileges should be determined on a case-by-case basis.

S. REP. No. 1277, 93rd Cong., 2nd Sess. 13 (1974).

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